78-1374

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. A-609

ANDY MARTIN,

Appellant,

v.

THE BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, FLORIDA, AND FRANK WANICKA, SHERIFF OF LEE COUNTY, FLORIDA,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

Andy Martin, the Appellant, appeals from the Final Judgment of the Supreme Court of Florida, dated October 5, 1978, rehearing denied December 8, 1978 (App-34a,36a), holding that Lee County, Florida Ordinance 75-9 (App-17a), is constitutional and not violative of (a) Appellant's rights of free speech guaranteed by the First Amendment of the Constitution of the United States, (b) Appellant's rights of due process of law guaranteed by the Fifth and Fourteenth Amendments of the Constitution of the United States,

and (c) Appellant's rights of equal protection of the law guaranteed by the Fourteenth Amendment of the Constitution of the United States.

OPINIONS BELOW

The opinion of the Supreme Court of Florida (App-34a)is reported at 364 So.2d 449 (Fla. 1978), *rehearing denied* December 8, 1978 (App-36a). Such opinion adopted the opinion of the Second District Court of Appeals of Florida (App-22a) in its entirety, which opinion is reported at 348 So.2d 916 (Fla. 2d DCA 1977).[1]

The Final Order of the Circuit Court of the Twentieth Judicial Circuit in and for Lee County, Florida, dated August 6, 1976, which held Ordinance 75-9 unconstitutional is also reprinted in the appendix hereto (App-12a).

JURISDICTION

The judgment of the Supreme Court of Florida, upholding the reversal of the trial court's ruling that the Ordinance was unconstitutional, was entered on October 5, 1978 (App-34a). A Motion for Rehearing was entertained and denied by the Supreme Court of Florida on December 8, 1978 (App-36a).

A Notice of Appeal to this Court was duly filed in the

[1]Further references herein to specific portions of the Florida Supreme Court opinion at 364 So.2d 449, will cite the Second District Court of Appeals opinion at 348 So.2d 916 because of such adoption.

Supreme Court of Florida on December 18, 1978 (App-37a).

This appeal is being docketed in this Court within 90 days from the denial of the rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2). *See*, *Erznoznick v. City of Jacksonville*, 422 U.S. 205, 207, n. 3 (1975) ("A local ordinance is deemed a state statute for purposes of invoking this Court's jurisdiction under 28 U.S.C. 1257(2)").

QUESTIONS PRESENTED

1. Whether Lee County Ordinance 75-9 is facially violative of the Free Speech Clause of the First Amendment of the Constitution of the United States.
2. Whether Lee County Ordinance 75-9 is facially violative of the Equal Protection Clause of the Fourteenth Amendment of the United States.[2]

CONSTITUTIONAL PROVISIONS AND ORDINANCE

First Amendment, United States Constitution:

Congress shall make no law. . . abridging the freedom of speech. . .

Fourteenth Amendment, United States Constitution:

[N]or shall any State deprive any person of life,

[2]Appellant, without waiving his Fifth Amendment claim, will not argue the substantiality of such federal claim, in this jurisdictional statement, even though the Florida Supreme Court considered and expressly rejected such claim.

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Lee County Ordinance 75-9:

Section 1. LEGISLATIVE AUTHORIZATION.

This Ordinance is adopted pursuant to Article VIII, Section I, under the State Constitution and Section 125.01(0) of the Florida Statutes.

Section 2. PROHIBITION.

2.1 It shall be unlawful for any person maintaining, owning or operating a commercial establishment located within the unincorporated areas of Lee County, Florida, at which alcoholic beverages are offered for sale for consumption on the premises:

(a) To suffer or permit any female person, while on the premises of said commercial establishment, to expose to the public view that area of the human female breast at or below the areola thereof.

(b) To suffer or permit any female person, while on the premises of said commercial establishment, to employ any device or covering which is intended to give the appearance of or simulate such portions of the human female breast as described in Section 3.1(A).

(c) To suffer or permit any person, while on the premises of said commercial establishment, to expose to public view his or her genitals, pubic area, buttocks, anus, or anal cleft or cleavage.

(d) To suffer or permit any person, while on the

premises of said commercial establishment, to employ any device or covering which is intended to give the appearance of or simulate the genitals, public area, buttocks, anus, anal cleft or cleavage.

2.2 It shall be unlawful for any female person, while on the premises of a commercial establishment located within the unincorporated areas of Lee County, Florida, at which alcoholic beverages are offered for sale for consumption on the premises, to expose to public view that area of the human female breast at or below the areola thereof, or to employ any device or covering which is intended to give the appearance or simulate such areas of the female breast as described herein.

2.3 It shall be unlawful for any person, while on the premises of a commercial establishment located within the unincorporated areas of Lee County, Florida, at which alcoholic beverages are offered for sale for consumption on the premises, to expose to public view his or her genitals, pubic area, buttocks, anus, or anal cleft or cleavage, or to employ any device or covering which is intended to give the appearance of or simualte the genitals, pubic area, buttocks, anus, or anal cleft or cleavage.

Section 3. PENALTIES.

Any person who shall violate any section of this Ordinance shall be guilty of a misdemeanor punishable by a fine not to exceed $500.00 or imprisonment in the County Jail not to exceed sixty (60) days, or both.

Section 4. SEVERABILITY.

It is declared to be the legislative intent that, if any section, sub-section, sentence, clause or provision of this Ordinance is held invalid, the remainder of the Ordinance shall not be affected.

Section 5. EFFECTIVE DATE.

This Ordinance takes effect immediately upon receipt of the official acknowledgment from the Office of the Secretary of State of Florida that this Ordinance has been filed with said office.

DULY PASSED AND ADOPTED BY THE BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, FLORIDA THIS 16th day of July, A.D., 1975.

ATTEST: SAL GERACI, CLERK

BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, FLORIDA

By: /s/ Deputy Clerk

By: /s/ James M. Sweeney, Jr. Chairman

* * * *

RAISING THE FEDERAL QUESTION

The constitutionality of the Ordinance was first raised by the Appellant in the trial court by his Complaint for Declaratory and Injunctive Relief,

wherein it was stated that the subject Ordinance "was unconstitutionally enacted, . . . constitutes an unconstitutional exercise of the County's police power, . . . is unconstitutionally vague and overbroad, . . . denies the Plaintiffs protections afforded under the United States and Florida Constitutions, [and] . . . is unconstitutional on its face." (App-5a).

In its Final Order, the trial court held portions of the Ordinance "void" (App-15a). Upon appeal by the Appellees herein, the state intermediate appellate court reversed, holding that the subject Ordinance "is [not in] contravention of the constitutional guarantees of free speech and expression." (App-31a). 348 So.2d at 920.

The constitutional questions presented herein were reiterated by Appellant before the Supreme Court of Florida through his Assignments of Error (App-32a). Appellant asserted that the state intermediate appellate court erred in reversing the ruling of the trial court since the subject Ordinance is "violative of the First Amendment to the United States Constitution. . . the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution. . . [and] the equal protection clause of the Fourteenth Amendment to the United States Constitution." (App-32a). The Supreme Court of Florida affirmed the decision of the state intermediate appellate court and adopted its opinion in its entirety (App-35a,36a). The Supreme Court of Florida thus considered and expressly rejected these federal constitutional claims.

STATEMENT OF THE CASE

The Appellant, Andy Martin, is the owner of Martin's Lounge, an establishment licensed by the State of Florida to sell beer and wine in Lee County, Florida. In May of 1975, Appellant began offering entertainment in his establishment in the form of "topless dancing." (App-2a).

On or about July 16, 1975, the Board of Commissioners of Lee County, Florida (herein called the "Board") held a public hearing for the purpose of enacting Lee County Ordinance 75-9 (App-17a);the Ordinance was in fact enacted on such date.

On July 28, 1975, Appellant filed with the trial court a Complaint for Declaratory and Injunctive Relief, requesting that the subject ordinance be declared "void, unconstitutional and ineffective." (App-4a).On August 6, 1976, the trial court declared those portions of the Ordinance pertaining to exposure of the female breast, to wit, Section 2.1(A) and 2.1(B), and 2.1[sic, 2.2], void under the First Amendment of the Constitution of the United States (App-15a).

The Board appealed this Final Order to the Second District Court of Appeals of the State of Florida, which reversed the Final Order on the basis that the Ordinance regulated conduct, not speech, and that the Ordinance was a rational exercise of the police power of Lee County (App-22a).

Appellant then filed a direct appeal of such decision to the Supreme Court of Florida, which affirmed the Second District decision and adopted such decision in its opinion entered on October 5, 1978 (App-34a).The Florida Supreme Court subsequently denied a motion for rehearing on December 8, 1978 (App-36a).

THE QUESTIONS ARE SUBSTANTIAL

1. *First Amendment Question:* Appellant's First Amendment claim is a substantial one, in that the Supreme Court of Florida, as have many other state courts, as will be shown below, has misconstrued and misapplied this Court's decision in the case of *California v. LaRue,* 409 U.S. 109 (1972), and has used such decision as the basis for improperly denying Appellant and others their constitutionally guaranteed right of freedom of speech and expression.

Citing *LaRue* for its authority, the Florida Supreme Court in its adopted opinion, stated:

> Adult females who choose to display their breasts in public to patrons in a bar, or who are required to do so by their employer, are engaged in conduct incident to a commercial endeavor. They are not expressing their right of free speech or expression.

348 So.2d at 919 (App-31a).By finding topless dancing to be conduct not speech, the Florida Supreme Court reasoned that the Ordinance was "a valid exercise of Lee County's police power", which did not necessitate the delegation of Twenty-First Amendment powers to the County. 348 So.2d at 920 (App-31a).

However, *LaRue* did not even involve regulations forbidding topless dancing or the mere exposure of the female breast, but dealt with regulations banning "gross sexuality" *Id,* 409 U.S. at 118. Moreover, this Court in *LaRue* recognized that even topless dancing was within the protection of the First and Fourteenth Amendments, and concluded that the regulations were facially valid only because of the ". . . presumption in

favor of the validity of state regulation in the area which the Twenty-First Amendment requires. . ." *Id.*, at 118, 119. In other words, the *LaRue* decision was based upon two prerequisites: (1) a rational basis must exist for the regulation, i.e., gross sexuality which gives rise to or instigates other social evils and (2) a promulgation of such regulations under Twenty-First Amendment powers. Nevertheless, the Florida Supreme Court did not attempt to square its decision with *LaRue*, but instead essentially held that topless dancing enjoyed no protection under the First Amendment, and could be wholly regulated under general governmental police powers. Needless to say, this Court and other courts have ruled to the contrary.

Since the *LaRue* decision was handed down, subsequent federal court decisions have properly construed the true import of *LaRue*, have reiterated that topless dancing, even in bars, is constitutionally protected, and have recognized this Court's limitation of *LaRue* to the regulation of gross sexuality under Twenty-First Amendment powers. See, *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Salem Inn, Inc. v. Frank*, 364 F. Supp. 478 (E.D. N.Y. 1975), aff'd 501 F.2d 21 (2d Cir. 1974); *Salem Inn, Inc., v. Frank*, 381 F. Supp. 859 (E.D. N.Y. 1975), affd 522 F.2d 1045 (2d Cir. 1975); *Women's Liberation Union of Rhode Island v. Israel*, 512 F.2d 106 (1st Cir. 1975); *Felix v. Young*, 536 F.2d 1126 (6ht Cir. 1976); *Richter v. Dept. of Alcoholic Beverage Control*, 559 F.2d 1168 (9th Cir. 1977); *Escheat, Inc. v. Pierstorff*, 354 F. Supp. 1120 (W.D. Wis. 1973); *Peto v. Cook*, 364 F. Supp. 1(S.D. Ohio, 1973), aff'd 415 U.S. 943 (1974); *Manos v. City of Green Bay*, 372 F. Supp. 40 (E.D. Wis. 1974); *Birkenshaw v. Haley*, 409 F. Supp. 13 (E.D. Mich. 1974); *Atwood v. Purcell*, 402 F. Supp. 231 (D.C. Ariz.

1975); *Vintage Imp. Ltd. v. Joseph E. Seagram & Sons*, 409 F. Supp. 497 (E.D. Va. 1976); *Saxe v. Brennan*, 416 F. Supp. 892 (E.D. Wis. 1976); *Inturri v. Healy*, 426 F. Supp. 543 (D.C. Conn. 1977), *500 Via De Palmas Corp. v. McCutcheon*, ____ F. Supp. ____ (S.D. Fla. 1979), opinion attached at page 37 of Appendix hereto, which struck down as facially unconstitutional an ordinance (App-39a) identical to that of the subject Lee County Ordinance (App-17a).

On the other hand, numerous state court decisions, including that of the Florida Supreme Court in the case at bar, under the guise of *LaRue* have upheld laws banning topless dancing regardless of the existence of any rational basis for same, *City of Seattle v. Hinkley*, 517 P.2d 592 (Wash. 1973); *Wayside Restaurant v. City of Virginia Beach*, 208 S.E.2d 51 (Va. 1974); *Cheetah Enterprises, Inc. v. County of Lake*, 317 N.E.2d 129 (Ill. 2d DCA 1974); *Longbridge Investment Co. v. Moore*, 533 P.2d 564 (C.A. Ariz. 1975); *Wright v. Huxley*, 249 N.W.2d 672 (Iowa 1977), or the existence of powers properly delegated to the county or municipality by the State under the Twenty-First Amendment, *Koppinger v. City of Fairmont*, 248 N.W.2d 708 (Minn. 1976); *Martin v. Board of Cty. Com'rs of Lee Cty*, 364 So.2d 449 (Fla. 1978). *But see*, *State v. Gates*, 546 P.2d 52 (C.A. Ariz. 1976) (statute banning topless dancing held unconstitutional); *Com v. Sees*, 373 N.E.2d 451 (Mass. 1978) (topless ordinance held unconstitutional under free speech clause of *state* constitution).

When faced with the plethora of federal court decisions which correctly recognized the limited scope of *LaRue*, the Florida Supreme Court unreluctantly ignored such decisions by stating that, "The only federal decisions binding upon the courts of our state

are those of the United States Supreme Court." *Martin v. Board of Cty. Com'rs of Lee Cty.*, 348 So.2d at 918.

Notwithstanding the many post *LaRue* decisions treating this issue on both federal and state levels, this Court has never directly addressed a First Amendment claim as it applies to topless dancing, per se[3]; and, as shown above, the various state courts have consequently bent over backwards to stretch the limits of *LaRue* to broader areas of coverage, while paying little or no heed to lower federal court decisions stressing the limited application of *LaRue*.

This disturbing situation was drawn into sharp focus when the United States District Court of the Southern District of Florida recently ruled portions of an ordinance (App-39a) identical to the subject Ordinance (App-15) unconstitutional under the First Amendment (App-37), *500 Via De Palmas Corp. v. McCutcheon*, ___ F.Supp. ___ (1979) (App-44a). In the oral ruling referenced in the judgment entered in that case (App-39), Judge Joseph Eaton repeatedly referred to the Florida Supreme Court decision rendered in this case (App-58a,59a,69a,74a), recognized that in enacting the Ordinance only general police powers, not Twenty-First Amendment powers, were at play, and correctly held, that, absent Twenty-First Amendment powers, those portions of the Boca Raton Ordinance banning the exposure of the female breast or the buttocks or anal cleft of any person must fall (App-59a,60a,64a,68a,78a,

[3]The only reported decision of this Court involving this issue is *Doran v. Salem Inn, Inc.*, supra, wherein this Court limited its inquiry solely to the propriety of granting a preliminary injunction.

93a).[4]

The question, therefore, concerning the propriety of restricting expression in the form of topless dancing in bars is not only novel to this Court, but reaches this Court in a state of confusion. Thus, the citizens of Florida, as well as the nation, are confronted with the anamalous situation of having the lower federal courts construing the ambits of constitutionally guaranteed rights one way, while state courts are construing them another, in a more restrictive fashion under the mistaken authority of *LaRue*. This Court noted in *LaRue* that as to future problems which arise in this area of regulation that there "will be time enough to consider any such problems when they arise." 409 U.S. 119, n.5.

It is respectfully suggested that in light of the continued misapplication and misconstruction of *LaRue* by the state courts, including the Florida Supreme Court in the case at bar, the First Amendment claim raised herein is indeed substantial, and the time has come for this Court to consider and clarify this important federal question.

2. *Fourteenth Amendment Question*: The question of

[4]For the other cases expressly recognizing that topless ordinances, absent Twenty-First Amendment power, are facially unconstitutional, see, *Clark v. City of Freemont, Nebraska*, 377 F. Supp. 327, 335, n.8 (D.C. Neb. 1973); *Escheat, Inc. v. Pierstorff*, 354 F. Supp., at 1123; *Manos v. Green*, 372 F. Supp., at 47, 48; and *Com v. Sees*, 373 N.E.2d at 1155, holding that under the free speech clause of the Massachusetts Constitution, the Twenty-First Amendment does not limit the application of such clause as it does the First Amendment; consequently no distinction between "free speech in a bar and free speech on a stage . . ." can constitutionally be made.

abridgment of the right to equal protection under the law raised by the subject Ordinance is also both a novel and substantial one. This question is raised by two distinct aspects of the Ordinance, to wit: (1) the Ordinance is applicable only to establishments licensed to sell liquor and (2) portions of the Ordinance are applicable only to females who expose their breasts while on the premises of such an establishment (App-18a,20a). Neither aspects of this question has been treated previously by this Court.

While this Court has ruled that state regulation of certain forms of nudity or sexual acts in bars is permissible by virtue of the powers delegated to the States under the Twenty-First Amendment, *California v. LaRue*, 409 U.S. 109 (1972), and has further held it improper to ban such acts in all public places, *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), this case presents the heretofore unanswered question of whether, absent the presence of the Twenty-First Amendment powers, bars may be singled out from other commercial establishments for the purpose of regulating topless dancing.

A mere assertion that Appellant's business sells liquor does not support this form of discrimination since regulation of the liquor business is limited by due process and equal protection requirements. *Kornsby v. Allen*, 330 F.2d 55, 56 (5th Cir. 1964). Furthermore, arbitrary or unreasonable liquor license procedures violate the equal protection clause of the Fourteenth Amendment. *Parks v. Allen*, 409 F.2d 210 (5th Cir. 1969). Even if fortified by the Twenty-First Amendment, regulations still cannot irrationally and invidiously discriminate in the sale, distribution, importation and use of alcoholic beverages. *Patch Enterprises, Inc. v. McCall*, 447 F. Supp. 1075 (M.D. Fla. 1978).

The Florida Supreme Court, in its adopted opinion in this case (App-22a), found that the Ordinance was enacted by the Board only under the general police powers of the County, due to the limited areas of regulation granted to Lee County by the State of Florida.[5] Yet, without the "broad sweep of the Twenty-First Amendment"[6] to support this patently discriminatory ordinance, what compelling justification possibly exists for differentiating between topless dancing in a bar and topless dancing in a theater or stage production?[7] The record in this case is wholly devoid of any such justification. In fact, the Florida Supreme Court simply ignored Appellant's Fourteenth Amendment claims.

Nextly, Sections 2.1(A), 2.1(B) and 2.1[sic 2.2], deal only with the exposure of the human female breasts. The Ordinance does not attempt to ban or criminalize the exposure of the human male breast.

---

[5]"Local control over establishments selling alcoholic beverages is limited to: (1) hours of operation; (2) location of business; and (3) sanitary regulations . . . we have determined the assailed provisions of Ordinance No. 75-9 . . . represent a valid exercise of Lee County's police power. 348 So.2d at 919, 920.

[6]*California v. LaRue*, 409 U.S. at 114.

[7]See, *Salem Inn, Inc. v. Frank*, 522 F.2d 1045, 1049 (7th Cir. 1975) ". . . the ordinance would fall because the town has failed to show any legitimate underlying municipal interest to which its discrimination among various commercial establishments can be rationally related." See also, verbal ruling of *500 Via De Palmas Corp. v. McCutcheon*, ___ F. Supp. ___ (S.D. Fla. 1979), reprinted herein at page 46a of the Appendix.

This Court has held that gender classifications "are inherently suspect and must. . . be subjected to close scrutiny." *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973). See also, *Reed v. Reed*, 404 U.S. 71 (1971). In order to withstand constitutional challenge,

> . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.

Craig v. Boren, 429 U.S. 190, 197 (1976).

Under the subject ordinance, a male performer may expose his breasts, fondle them, or have patrons fondle them or employ devices which give the appearance of the female breast with no threat of arrest or criminal prosecution, while a female performer, solely by virtue of her sex, cannot. To say that such a distinction is based upon the arousing sexual effect exposure of the female breasts may have upon males (or females, for that matter) irrationally presupposes that the exposure of the male breast, especially when coupled with dance, has no such effect. As stated in *White v. Fleming*, 522 F.2d 730 (7th Cir. 1975), cited with approval by this Court in *Craig v. Boren*, supra:

> We think it impermissible under the equal protection clause to classify on the basis of stereotyped assumptions concerning propensities thought to exist in some members of a given sex. 522 F.2d at 737.

Although Appellant recognizes that an anatomical difference does exist between the breasts of some men and women, it is suggested that this classification in the ordinance is predicated soley upon sexist enculturation. Other than sex bias, what acceptable rationale

exists for subjecting a woman to criminal prosecution for engaging in conduct (if not expression) in which a male may freely engage? Clearly, no such rationale exists.

In summary, the Florida Supreme Court has upheld as constitutional an ordinance passed under the County's police power, which arbitrarily proscribes the exposure of the female breast in bars, while not subjecting males or other commercial establishments to the same proscriptions. The total absence of any discernible lawful rationale for such discrimination underscores the substantiality of Appellant's Equal Protection claim.

CONCLUSION

Based upon the reasons set forth hereinabove, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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/s/ Steven Carta
Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by regular United States Mail, postage prepaid, to JULIAN CLARKSON, ESQ., Holland & Knight, P.O. Box 2112, Fort Myers, Florida 33902 and KENNETH JONES, ESQ., P.O. Box 398, Fort Myers, Florida, 33902 on this 8th day of March, 1979.

/s/ Steven Carta

Steven Carta

Member of the Bar of the
Supreme Court of the United States

APPENDIX A

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA.

CIVIL ACTION

ROBERT DEXTERHOUSE and ANDY MARTIN,	*	**Case No.**
Plaintiffs,	*	
vs.	*	
THE BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, FLORIDA, and FRANK WANICKA, SHERIFF OF LEE COUNTY, FLORIDA,	*	
Defendants.	*	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Come now the Plaintiffs, ROBERT DEXTERHOUSE and ANDY MARTIN, by and through their undersigned attorneys, and sue the Defendants, THE BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, FLORIDA and FRANK WANICKA, SHERIFF OF LEE COUNTY, FLORIDA, and say:

1. This is an action for a declaratory judgment pursuant to Chapter 86, Florida Statutes, and for injunctive relief.

2. The Plaintiffs are citizens of Lee County, Florida.

3. The Defendant, BOARD OF COUNTY COMMISSIONERS, hereinafter called the Board, is the chief legislative body in and for Lee County, Florida. The Defendant Frank Wanicka, hereinafter called the Sheriff, is the chief law enforcement officer in and for Lee County, Florida.

4. The circumstances giving rise to this action all arose and will arise in Lee County, Florida, and have caused a controversy to arise between the Plaintiffs and Defendants as a result of which Plaintiffs are in doubt as to their rights.

5. The Plaintiffs are entitled to relief against the Defendants upon the following facts:

(a) The Plaintiffs are owners of commercial establishments in Lee County, Florida, which are licensed by the State of Florida to sell alcoholic beverages for consumption on the premises.

(b) Some months prior to the institution of this action, the Plaintiffs began offering entertainment in their establishments commonly known as "topless dancing."

(c) The Sheriff, upon learning of these activities, proposed to the Board that it pass an Ordinance prohibiting this form of entertainment.

(d) Upon the recommendation of the Sheriff, the Board instructed its County Attorney to prepare such an Ordinance and set a public hearing for the purpose of hearing testimony showing the relationship between topless dancing in places serving alcoholic beverages and an increase in crime, moral degradation and disturbances of the peace and good order of the community, and other findings detrimental to the peace and welfare of the community.

(e) On or about July 16, 1975, the Board held a public hearing, at which time the County Attorney advised the Board that "topless dancing" per se was a valid exercise of one's rights under the Florida and United States Constitutions, but that by limiting the impact of the Ordinance to establishments where alcoholic beverages were sold, the Ordinance might be upheld. However, he admonished the Board that it must be satisfied by competent evidence that there was, or "might be", a direct relationship between the concurrent consumption of alcoholic beverages and the nude and semi-nude activities mentioned in the proposed Ordinance, and an increase in criminal activities, moral degradation and disturbances of the peace and good order of the community, and that the concurrency of these activities was hazardous to the health and safety of those persons in attendance, and tended to depreciate the value of adjoining property and harm the economic welfare of the community as a whole.

(f) The testimony at the public hearing failed to prove or establish any of the foregoing.

(g) The Board, despite the complete and total lack of competent testimony or evidence, and with utter disregard for the law and the consequences of their acts, unanimously passed the Ordinance.

(h) The Ordinance, Lee County Ordinance No. 75-9, went into force and effect on or about July 23, 1975. A copy of said Ordinance is attached hereto and made a part hereof, as Plaintiffs' Exhibit "A".

(i) Said Ordinance only applies to the unincorporated areas of Lee County, and has no effect on certain similar establishments within incorporated

areas of Lee County.

(j) The Sheriff, as the chief law enforcement officer of Lee County, and being charged by law with the enforcement and administration of said Ordinance, has vowed to enforce the ordinance, which would cause the criminal penalties imposed therein to be levied against the Plaintiffs, and he therefor has an interest in this proceeding and the issues herein involved.

6. Because of the actions of the Defendants, and because of the threatened acts of enforcement, the Plaintiffs will sustain irreparable injury through criminal prosecution and loss of business, which amounts to a deprivation of constitutional and other personal rights and freedoms, and it will be impossible for Plaintiffs to ascertain the exact amount of damages they will sustain through the commission and continuance of these acts if Defendants are not enjoined from the enforcement of the Ordinance. Plaintiffs cannot be fully compensated in damages and are without an adequate remedy of law.

7. It is the opinion of the Plaintiffs that Lee County Ordinance No. 75-9, and the action taken by the Board as aforesaid, is void and unconstitutional and of no effect, for the following reasons:

(a) The conduct of the Board was illegal.

(b) The Ordinance was unconstitutionally enacted.

(c) The Ordinance constitutes an unconstitutional exercise of the County's police power.

(d) The Ordinance is unconstitutionally vague and overbroad.

(e) The Ordinance is discriminatory in that it only applies to the unincorporated areas of the County.

(f) The Ordinance denies the Plaintiffs protections afforded under the United States and Florida Constitutions.

(g) The Ordinance is unconstitutional on its face.

8. It is manifest from the allegations of this verified complaint that the injury will be done if an immediate remedy is not afforded.

WHEREFORE, Plaintiffs pray for a declaratory judgment declaring that Lee County Ordinance No. 75-9 is inapplicable to Plaintiffs, or that the same is void, unconstitutional and ineffective, and without force of law, and the Plaintiffs thereby are not required to comply with the terms and provisions thereof; that the Defendants and each of them, their agents and representatives be restrained and enjoined by the order of this Court, pending the final determination of the issues stated herein, and upon such determination, be permanently restrained and enjoined from exercising any of the powers, rights or duties respecting the enforcement of said act against Plaintiffs insofar as it purports to confer such rights, powers and duties upon said Defendants and each of them; and that Plaintiffs may have their costs and such other further relief as the

Court may deem equitable.

ALDERMAN & WALLACE, P.A.

By /s/ Frank C. Alderman III
Frank C. Alderman, III
Attorneys for Plaintiffs
P.O. Drawer 249
Fort Myers, Florida 33902

/s/ Robert Dexterhouse
Robert Dexterhouse

/s/ Andy Martin
Andy Martin

STATE OF FLORIDA

COUNTY OF LEE

I HEREBY CERTIFY, that on this day personally appeared before me, ROBERT DEXTERHOUSE and ANDY MARTIN, to me well known to be the persons described in and who executed the foregoing Complaint for Declaratory and Injunctive Relief, and who acknowledged before me that they executed the same freely and voluntarily for the purposes therein expressed, and that same is true to their knowledge and belief.

WITNESS my hand and official seal at Fort Myers, Lee County, Florida, this 28th day of July, 1975.

/s/ Irene Millican
Notary Public

My commission expires
March 7, 1979

PLAINTIFF'S EXHIBIT "A"

LEE COUNTY ORDINANCE NO. 75-9

An ordinance prohibiting the exposure of private parts or female breasts in an establishment at which alcoholic beverages are offered for sale for consumption on the premises; prohibiting the use of any device or covering which simulates private parts or female breasts in an establishment at which alcoholic beverages are offered for sale for consumption on the premises; prohibiting any person owning, maintaining or operating an establishment at which alcoholic beverages are offered for sale for consumption on the premises from suffering or permitting, on the premises of said establishment, the exposure of private parts or female breasts or the use of any device or covering which simulates private parts or female breasts; legislative authorization; providing for penalties; severability and effective date.

WHEREAS, the Board of County Commissioners of Lee County, Florida, finds that there is presently, in Lee County, an increasing trend toward nude and semi-nude acts, exhibitions, and entertainment, and toward the utilization of nude and semi-nude female employees engaged in other service oriented aspects of and by the commercial establishments subject hereto; and,

WHEREAS, the Board of County Commissioners of Lee County, Florida, finds that the competitive commercial exploitation of such nudity is adverse to the public's interest in the quality of life, tone of commerce, and total community environment in Lee County; and,

WHEREAS, the Board of County Commissioners of Lee County, Florida, finds that there is a direct relationship between the concurrent consumption of alcoholic beverages and the nude and semi-nude activities mentioned above, prohibited hereunder, and more fully described hereinafter and an increase in criminal activities, moral degradation and disturbances of the peace and good order of the community, and further finds that the concurrency of these activities is hazardous to the health and safety of those persons in attendance; and tends to depreciate the value of adjoining property and harm the economic welfare of the community as a whole; and

WHEREAS, the Board of County Commissioners of Lee County, Florida, finds that in order to preserve the public peace and good order, and to safeguard the health, safety and welfare of the community and the citizens thereof, it is necessary and advisable to regualte and restrict the conduct of owners, operators, agents, employees, and patrons of the commercial establishments subject hereto.

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, FLORIDA:

Section 1. LEGISLATIVE AUTHORIZATION.

This Ordinance is adopted pursuant to Article VIII, Section 1, under the State Constitution and Section 125.01(o) of the Florida Statutes.

Section 2. PROHIBITION.

2.1 It shall be unlawful for any person maintaining,

owning or operating a commercial establishment located within the unincorporated areas of Lee County, Florida, at which alcoholic beverages are offered for sale for consumption on the premises:

(a) To suffer or permit any female person, while on the premises of said commercial establishment, to expose to the public view that area of the human female breast at or below the areola thereof.

(b) To suffer or permit any female person, while on the premises of said commercial establishment, to employ any device or covering which is intended to give the appearance of or simulate such portions of the human female breast as described in Section 3.1(a).

(c) To suffer or permit any person, while on the premises of said commercial establishment, to expose to public view his or her genitals, pubic area, buttocks, anus, or anal cleft or cleavage.

(d) To suffer or permit any person, while on the premises of said commercial establishment, to employ any device or covering which is intended to give the appearance of or simulate the genitals, pubic area, buttocks, anus, anal cleft or cleavage.

2.1 It shall be unlawful for any female person, while on the premises of a commercial establishment located within the corporated areas of Lee County, Florida, at which alcoholic beverages are offered for sale for consumption on the premises, to expose to public view that area of the human female breast at or below the areola thereof, or to employ any device or covering which is intended to give the appearance or simulate such areas of the female breast as described herein.

2.3 It shall be unlawful for any person, while on the premises of a commercial establishment located within the unincorporated areas of Lee County, Florida, at which alcoholic beverages are offered for sale for consumption on the premises, to expose to public view his or her genitals, pubic area, buttocks, anus, or anal cleft or cleavage, or to employ any device or covering which is intended to give the appearance of or simulate the genitals, pubic area, buttocks, anus or anal cleft or cleavage.

Section 3. PENALTIES.

Any person who shall violate any section of this Ordinance shall be guilty of a misdemeanor punishable by a fine not to exceed $500.00 or imprisonment in the County Jail not to exceed sixty (60) days, or both.

Section 4. SEVERABILITY.

It is declared to be the legislative intent, that, if any section, sub-section, sentence, clause or provision of this Ordinance is held invalid, the remainder of the Ordinance shall not be affected.

Section 5. EFFECTIVE DATE.

This Ordinance takes effect immediately upon receipt of the official acknowledgement from the Office of the Secretary of State of Florida that this Ordinance has been filed with said office.

DULY PASSED AND ADOPTED BY THE BOARD OF COUNTY COMMISSIONERS OF LEE

COUNTY, FLORIDA, this 16th day of July, A.D. 1975.

ATTEST:

SAL GERACI, CLERK

By /s/Lois Kurtz
Deputy Clerk

APPROVED AS TO FORM & LEGAL SUFFICIENCY
OFFICE OF COUNTY ATTORNEY
By
7-17-75

BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, FLORIDA

By /s/James Sweeney, Jr.
James M. Sweeney, Jr.
Chairman

State of Florida

County of Lee

I, Sal Geraci, Clerk of the Circuit Court in and for said County and State do hereby certify that the foregoing is a true photostatic copy of Ordinance No. 75-9 adopted by Bd. of Co. Comrs. on July 16, 1975.

Given under my hand and official seal at Fort Myers, Florida this 25th day of July A.D. 1975.

SAL GERACI, Clerk

By /s/ Lois Kurtz D.C.

IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR LEE COUNTY, FLORIDA.

CIVIL ACTION

ROBERT DEXTERHOUSE and ANDY MARTIN, *Plaintiffs,* vs. THE BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, FLORIDA, and FRANK WANICKA, SHERIFF OF LEE COUNTY, FLORIDA, *Defendants.*	**Case No. 75-1814CA-JRA**

FINAL ORDER

This matter came on in due course for Pre-Trial Conference under the appropriate Rule of Civil Procedure. All parties agreed that there were no factual issues in dispute and that the matter of the constitutionality of Lee County Ordinance No. 75-9 as a matter of law would be determinative of the case. The Pre-Trial hearing was continued to give the parties an opportunity to prepare and argue the issue of law.

The plaintiffs are owners of commercial establishments in Lee County, Florida, which are licensed by the State of Florida to sell alcoholic beverages for consumption on the premises. Some months prior to the institution of this action the plaintiffs began

offering entertainment in their establishments commonly called "topless dancing". Lee County, through its Board of County Commissioners, enacted Ordinance Number 75-9, a copy of which is attached hereto, and which provides in part:

Section 2. PROHIBITION.

2.1 It shall be unlawful for any person maintaining, owning or operating a commercial establishment located within the unincorporated areas of Lee County, Florida, at which alcoholic beverages are offered for sale for consumption on the premises:

> A. To suffer or permit any female person, while on the premises of said commercial establishment, to expose to the public view that area of the human female breast at or below the areola thereof.

2.1(sic) It shall be unlawful for any female person, while on the premises of a commercial establishment located within the unincorporated areas of Lee County, Florida, at which alcoholic beverages are offered for sale for consumption on the premises, to expose to public view that area of the human female breast at or below the areola thereof, - - -.

Lee County Ordinance No. 75-9 became effective in due course on or about July 23, 1976.

Plaintiffs, knowing of the enactment of the Ordinance and its application to them, brought this action to enjoin its enforcement and specifically challenged the validity of the Ordinance under the Federal and State constitutions. An apparent constitutional infirmity was noted at the hearing on Motion for Temporary Restraining Order so that a temporary Order did issue.

All parties, through their counsel agree that nudity, *per se*, is not obscene and the conduct sought to be prohibited in the instant matter does not reach the level of, or the depth as the case may be, of obscenity.

FLORIDA CONSTITUTION ARTICLE VIII, Section 1 (f) provides:

> Non-Charter Government. Counties not operating under County Charters shall have such power of self-government as is provided by general or special law. The Board of County Commissioners of a county not operating under a charter may enact, in a manner prescribed by general law, county ordinances *not inconsistent with general or special law*, ---.

Plaintiffs contend that the Ordinance in question conflicts with Florida Statute 800.03, dealing with indecent exposure, and with Florida Statute 847, dealing with obscene literature and exhibitions. This court does not agree that there is a prohibited conflict. Ordinance No. 75-9 by its terms is not limited to the prohibition of *indecent* exposure of the human body or parts thereof, but concerns itself with *any* exposure, which may or may not be obscene. As before noted it was stipulated that nudity or exposure, *per se*, is not obscene.

Chapter 847, Florida Statutes, defining nudity among other things, prohibits the presentation for a monetary consideration of nudity to persons under the age of seventeen years not accompanied by a parent but does not prohibit the same presentation to persons over the stated age. Thus, argue the plaintiffs, the state has licensed such presentation to adults and has preempted the subject. However, failure to prohibit does not

confer a license or sanction. Florida Statute 847.09, preempting a field, by its own terms, preempts only those subjects addressed in Sections 847.07, and 847.08, which are not concerned with nudity but with obscene materials. Thus, this Court finds no inconsistency between Ordinance 75-9 and general or special law.

The case of *Salem Inn, Inc. v. Frank*, 522 F. 2nd 1045, (1975), however, is in point. There, the Federal Circuit Court of Appeals, Second Circuit, struck down a town ordinance nearly identical to the Ordinance in question on the ground that the ordinance was invalid for overbreadth under the First Amendment to the Constitution of the United States. Without comment on whether this Court agrees or disagrees with the decision in the *Salem Inn* case, this court feels, nevertheless, bound to follow the Federal decision on a point of Federal law.

Only the quoted portions of Ordinance No. 75-9 have been challenged. The Ordinance contains a severability clause, and with the quoted portions removed would continue to be a full, complete and viable enactment. It is thereupon

ORDERED, ADJUDGED and DECREED that Sections 2.1 (A) and 2.1 (sic) as above quoted be and the same hereby are stricken and held to be void, and the temporary restraining Order heretofore issued as it applies to these sections is made permanent. The balance of the said Ordinance shall remain in full force and effect.

DONE and ORDERED, in Chambers, in the Lee County Courthouse, Fort Myers, Florida, this 6th day

of August, 1976.

/s/ James R. Adams

CIRCUIT JUDGE

cc: Frank C. Alderman, III, Esq.
James Humphrey, County Attorney

LEE COUNTY ORDINANCE NO. 75-9

An ordinance prohibiting the exposure of private parts or female breasts in an establishment at which alcoholic beverages are offered for sale for consumption on the premises; prohibiting the use of any device or covering which simulates private parts or female breasts in an establishment at which alcoholic beverages are offered for sale for consumption on the premises; prohibiting any person owning, maintaining, or operating an establishment at which alcoholic beverages are offered for sale for consumption on the premises from suffering or permitting, on the premises of said establishment, the exposure of private parts or female breasts or the use of any device or covering which simulates private parts or female breasts; legislative authorization; providing for penalties; severability and effective date.

WHEREAS, the Board of County Commissioners of Lee County, Florida, finds that there is presently, in Lee County, an increasing trend toward nude and semi-nude acts, exhibitions, and entertainment, and toward the utilization of nude and semi-nude female employees engaged in other service oriented aspects of and by the commercial establishments subject hereto; and,

WHEREAS, the Board of County Commissioners of Lee County, Florida, finds that the competitive commercial exploitation of such nudity is adverse to the public's interest in the quality of life, tone of commerce, and total community environment in Lee County; and,

WHEREAS, the Board of County Commissioners of Lee County, Florida, finds that there is a direct relationship between the concurrent consumption of

alcoholic beverages and the nude and semi-nude activities mentioned above, prohibited hereunder, and more fully described hereinafter and an increase in Criminal activities, moral degradation and disturbances of the peace and good order of the community, and further finds that the concurrency of these activities is hazardous to the health and safety of those persons in attendance, and tends to depreciate the value of adjoining property and harm the economic welfare of the community as a whole; and,

WHEREAS, the Board of County Commissioners of Lee County, Florida, finds that in order to preserve the public peace and good order, and to safeguard the health, safety and welfare of the community and the citizens thereof, it is necessary and advisable to regulate and restrict the conduct of owners, operators, agents, employees, and patrons of the commerical establishments subject hereto.

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, FLORIDA:

Section 1. LEGISLATIVE AUTHORIZATION.

This Ordinance is adopted pursuant to Article VIII, Section 1, under the State Constitution and Section 125.01(o) of the Florida Statutes.

Section 2. PROHIBITION.

2.1 It shall be unlawful for any person maintaining, owning or operating a commercial establishment located within the unincorporated areas of Lee County, Florida, at which alcoholic beverages are offered for sale for consumption on the premises:

(A) To suffer or permit any female person, while on the premises of said commercial establishment, to expose to the public view that area of the human female breast at or below the areola thereof.

(B) To suffer or permit any female person, while on the premises of said commercial establishment, to employ any device or covering which is intended to give the appearance of or simulate such portions of the human female breast as described in Section 3.1(A).

(C) To suffer or permit any person, while on the premises of said commercial establishment, to expose to public view his or her genitals, pubic area, buttocks, anus, or anal cleft or cleavage.

(D) To suffer or permit any person, while on the premises of said commercial establishment, to employ any device or covering which is intended to give the appearance of or simulate the genitals, pubic area, buttocks, anus, anal cleft or cleavage.

2.1 It shall be unlawful for any female person, while on the premises of a commercial establishment located within the unincorporated areas of Lee County, Florida, at which alcoholic beverages are offered for sale for consumption on the premises, to expose to public view that area of the human female breast at or below the areola thereof, or to employ any device or covering which is intended to give the appearance or simulate such areas of the female breast as described herein.

2.3 It shall be unlawful for any person, while on the premises of a commercial establishment located within the unincorporated areas of Lee County, Florida, at which alcoholic beverages are offered for sale for consumption on the premises, to expose to public view his or her genitals, pubic area, buttocks, anus, or anal cleft or cleavage, or to employ any device or covering

which is intended to give the appearance of or simulate the genitals, pubic area, buttocks, anus or anal cleft or cleavage.

Section 3. PENALTIES.

Any person who shall violate any section of this Ordinance shall be guilty of a misdemeanor punishable by a fine not to exceed $500.00 or imprisonment in the County Jail not to exceed sixty (60) days, or both.

Section 4. SEVERABILITY.

It is declared to be the legislative intent that, if any section, sub-section, sentence, clause or provision of this Ordinance is held invalid, the remainder of the Ordinance shall not be affected.

Section 5. EFFECTIVE DATE.

This Ordinance takes effect immediately upon receipt of the official acknowledgement from the Office of the Secretary of State of Florida that this Ordinance has been filed with said office.

DULY PASSED AND ADOPTED BY THE BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, FLORIDA, THIS 16th day of July, A.D. 1975.

ATTEST: SAL GERACI, CLERK

BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, FLORIDA

By: /s/ Lois Kurtz
Deputy Clerk

By: /s/ James Sweeney, Jr.
James M. Sweeney, Jr.
Chairman

APPROVED AS TO FORM
& LEGAL SUFFICIENCY
By
OFFICE OF COUNTY ATTORNEY
7-17-75

State of Florida

County of Lee

I, Sal Geraci, Clerk of the Circuit Court in and for said County and State do hereby certify that the foregoing is a true photostatic copy of Ordinances No. 75-9 adopted by Bd. of Co. Comrs. on July 16, 1975.

Given under my hand and official seal at Fort Myers, Florida, this 25th day of July A.D. 1975.

SAL GERACI, Clerk

By /s/ Lois Kurtz D.C.
LOIS KURTZ

The BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, Florida, and Frank Wanicka, Sheriff of Lee County, Florida, Appellants,

v.

Robert DEXTERHOUSE and Andy Martin, Appellees.

No. 76—1442.

District Court of Appeal of Florida, Second District.

July 20, 1977.

Rehearing Denied Sept. 1, 1977.

Operators of commercial establishments which sold alcoholic beverages for consumption on the premises brought action for declaratory and injunctive relief against ordinance making it unlawful for those who sell alcoholic beverages for consumption on the premises to permit females to expose their breasts on the premises. The Circuit Court, Lee County, James R. Adams, J., granted relief and county commissioners appealed. The District Court of Appeal, Scheb, J., held that: (1) adult females who choose to display their breasts in public to patrons in a bar are engaged in conduct incident to a commercial endeavor and are not expressing their right of free speech or expression so that ordinance was not subject to attack on grounds that it was overbroad or violative of constitutional guarantees of free speech and expression, and (2) the ordi-

nance in question dealt with discipline and good order of persons while in establishments selling alcoholic beverages and did not interfere or conflict with state's regulation of the sale of such beverages and thus was not void on theory that the state had preempted the field.

Reversed.

1. Courts 97(1)

Decision of United States Court of Appeals holding a town ordinance similar to the one involved in the instant action unconstitutional under the First Amendment to the United States Constitution was not binding on Florida trial court. U. S.C.A. Const. Amend. 1.

2. Courts 97(1)

The only federal decisions binding upon the courts of Florida are those of the United States Supreme Court.

3. Constitutional Law 90(1)

First Amendment protection is applicable only where a communication element is present. U.S.C.A. Const. Amend. 1

4. Constitutional Law 90.1(6)

Adult females who choose to display their breasts in public to patrons in a bar, or who are required to do so by their employer, are engaged in conduct incident to a commercial endeavor and are not expressing their right of free speech or expression so that ordinance prohibiting such activity is not subject to challenge on

grounds that it is overbroad or violative of the guarantees of free speech and expression. U.S.C.A. Const. Amend. 1.

5. Intoxicating Liquors 11

Ordinance prohibiting any female from displaying her breasts in a commercial establishment at which alcoholic beverages are offered for sale for consumption on the premises was directed at discipline and good order of persons while in establishments selling alcoholic beverages and did not in any manner interfere or conflict with state's regulation of the sale of such beverages and thus was not void on theory that the state had preempted the right to regulate the field. West's F.S.A. §§561.02, 561.11, 562.45(2).

Julian Clarkson, James T. Humphrey, County Atty., and Kenneth A. Jones, Asst. County Atty., Fort Myers, for appellants.

Wilbur C. Smith, III, of Smith, Carta & Snow, Fort Myers, for appellee Andy Martin.

SCHEB, Judge.

Appellant Lee County enacted an ordinance making it unlawful for those who sell alcoholic beverages for consumption on the premises to permit females to expose their breasts on the premises. Appellees, who operate affected businesses in the unincorporated areas of the county, challenged the ordinance as being unconstitutional. The trial court held those portions which had the effect of proscribing topless dancing

were overbroad and in violation of the first amendment rights, and enjoined enforcement by the county and its sheriff. We hold the ordinance is a valid exercise of the police power by the Board of County Commissioners of Lee County. We reverse.

Appellees began featuring "topless dancing" at their establishments, whereupon the County Commissioners enacted the challenged Ordinance No. 75-9, the relevant portions of which provide as follows:

Section 2. PROHIBITION.

2.1 It shall be unlawful for any person maintaining, owning or operating a commercial establishment located within the unincorporated areas of Lee County, Florida, at which alcoholic beverages are offered for sale for consumption on the premises:

A. To suffer or permit any female person while on the premises of said commercial establishment, to expose to the public view that area of the human female breast at or below the areola thereof.

2.1(sic) It shall be unlawful for any female person, while on the premises of a commercial establishment located within the unincorporated areas of Lee County, Florida, at which alcoholic beverages are offered for sale for consumption on the premises, to expose to public view that area of the human female breast at or below the areola thereof.

Arguing they would sustain irreparable injury through criminal prosecution and loss of business,

appellees filed for a declaratory judgment contending said ordinance was unconstitutional. Appellees asked the court to enjoin the county and its sheriff from enforcing its provisions against them. In holding the above-quoted sections of the ordinance void, the trial judge stated:

> The case of *Salem Inn, Inc. v. Frank*, 522 F.2d 1045 (1975), however, is in point. There, the Federal Circuit Court of Appeals, Second Circuit, struck down a town ordinance nearly identical to the Ordinance in question on the ground that the ordinance was invalid for overbreadth under the First Amendment to the Constitution of the United States. Without comment on whether this Court agrees or disagrees with the decision in the *Salem Inn* case, this court feels, nevertheless, bound to follow the Federal decision on a point of Federal law.

[1,2] At the outset we observe that the *Salem* case was not binding on the trial court. The only federal decisions binding upon the courts of our state are those of the United States Supreme Court. *State v. Dwyer*, 332 So.2d 333 (Fla.1976).

This appeal presents two basic issues. First, whether Ordinance No. 75-9 is a valid exercise of the county's police power rather than a violation of the freedom of speech and expression guaranteed by the first amendment to the United States Constitution, Second, is the ordinance in conflict with Chapters 561 and 562, Florida Statutes (1975), which place the regulation of alcoholic beverages exclusively within the control of the Division of Beverage of the Department of Business Regulation?

Lee County, a non-charter county, is authorized to enact ordinances effective in its unincorporated areas, provided such ordinances are not inconsistent with general or special laws. Article VIII, Section 1(f), Florida Constitution. In enacting Ordinance No. 75-9, the County Commission of Lee County recited in one of the preambles of the ordinance that there was a direct relationship between " . . . concurrent consumption of alcoholic beverages and the nude and semi-nude activities [of females] . . . and an increase in criminal activities, moral degradation, and disturbance of the peace and good order of the community." On this premise the county's elected commissioners, relying on the county's police power, sought to prohibit the above-outlined activities, as well as other activities described in other portions of the ordinance not invalidated by the trial court.[1]

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[1]The portions ot the ordinance not invalidated by the trial court are as follows:

SECTION 2. PROHIBITION

2.1 It shall be unlawful . . .

(A) . . .

(B) To suffer or permit any female person, while on the premises of said commercial establishment, to employ any device or covering which is intended to give the appearance of or simulate such portions of the human female breast as described in Section 3.1(A).

(C) To suffer or permit any person, while on the premises of said commercial establishment, to expose to public view his or her genitals, pubic area, buttocks, anus, or anal cleft or cleavage.

2.2 . . .

2.3 It shall be unlawful for any perso, while on the premises of a commercial establishment located within the unincoporated areas of Lee County, Florida, at which alcoholic beverages are offered for sale for consumption on the premises, to expose his or her genitals, pubic area, buttocks, anus, anal cleft or cleavage, or to employ any device or covering which is intended to give the appearance of or simulate the genitals, pubic area, buttocks, anus or anal cleft or cleavage.

Police power regulations which bear a substantial relation to the public health, peace, safety, morals, or welfare should be upheld where the ordinance is within the ambit of the legislative authority of the local government. Courts recognize the propriety in allowing people, through their elected officials, to exercise police power authority. *City of Miami v. Kayfetz,* 92 So.2d 798 (Fla.1957).

The County Commissioners concluded there was a necessity for the ordinance. It is not our function to review the wisdom of their action. Rather, we should only determine if this ordinance is within the scope of their constitutional and statutory authority and demonstrates a rational exercise of their police power designed to correct conditions adversely affecting the public.

[3,4] We reject the contentions that the ordinance is overbroad and violative of the constitutional guarantees of free speech and expression. First amendment protection is applicable only where a "communication element" is present. *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). In *Hoffman v. Carson,* 250 So.2d 891 (Fla.1971), our supreme court quoted with approval from *City of Portland v. Derrington,* 253 Or. 289, 451 P.2d 111, *cert. denied,* 396 U.S. 901, 90 S.Ct. 212, 24 L.Ed.2d 177 (1969). There the Supreme Court of Oregon declared:

> When nudity is employed as sales promotion in bars and restaurants, nudity is conduct. As conduct, the nudity of employees is a fit subject for governmental regulation as is the licensing of the liquor dispensaries and the fixing of their closing hours. 451 P.2d at 113.

We agree. Adult females who choose to display their breasts in public to patrons in a bar, or who are required to do so by their employer, are engaged in conduct incident to a commercial endeavor. They are not expressing their right of free speech or expression.[2]

In *California v. La Rue,* 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972), the United States Supreme Court considered state regulations which prohibited certain sexually explicit conduct, including "topless" and "bottomless" dancing, in licensed bars and nightclubs. The Court rejected the argument that these regulations were forbidden by the first amendment. Moreover, the Court did not find "irrational" the State Beverage Department's conclusion "that the sale of liquor by the drink and lewd or naked dancing and entertainment should not take place in bars and cocktail lounges for which it has licensing responsibility." 409 U.S. at 118, 93 S.Ct. at 397.

But even if there is no constitutional prohibition against police power regulation of conduct proscribed by the ordinance, has the State of Florida preempted the right to regulate in this field?

Appellees correctly point out that the regulation and operation of establishments selling alcoholic beverages is by statute vested in the Division of Beverage which is granted full power or authority to adopt regulations to carry out the beverage laws of this state. Sections

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[2]We do not mean to imply that nudity can never be expression protected by the first amendment, only that it is not under the circumstances of this case. In the format of a legitimate stage production for example, we might very well find nudity to be expression. *See generally, California v. La Rue,* 409 U.S. 109, 114, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972).

561.02 and 561.11, Florida Statutes (1975). Local control over establishment selling alcoholic beverages is limited to: (1) hours of operation; (2) location of business; and (3) sanitary regulations. Section 562.45(2), Florida Statutes (1975).

We recognize the limited areas within which local government can legislate; however, there is a distinct difference between enactments which govern conduct of individuals while on the premises of their establishments, as opposed to the regulation of the licensees themselves in the sale and dispensing of alcoholic beverages. Illustrative of the distinctions are two decisions of the Supreme Court of Florida. In *State ex rel. Anthony Distributors, Inc. v. Pickett,* 59 So.2d 856 (Fla.1952), it was held an ordinance which authorized the City of Sarasota to investigate the character of licensees and to decline licenses to those it determined to be unfit was in direct contravention of the Beverage Act, Chapters 561 and 562, Florida Statutes (1951).

On the other hand, during an era when local governments were permitted to exercise their police power in a more protective manner in respect to women, the City of Miami passed an ordinance prohibiting barmaids from selling intoxicating liquors by the drink over the bar. In *Nelson v. State ex rel. Gross,* 157 Fla. 412, 26 So.2d 60 (Fla.1946), the court found that ordinance was not in conflict with the provisions of the Beverage Act, noting that the state plan of regulation did not cover that area. Similarly, in *City of Miami v. Jiminez,* 130 So.2d 109 (Fla.3d DCA 1961), the Third District Court of Appeal upheld a City of Miami ordinance prohibiting female employees in drinking establishments from accepting drinks paid for

by customers. When *Pickett, Nelson* and *Jiminez* were decided, the Beverage Act, just as it does now, limited local authorities to regulating hours of operation, location, and sanitary requirements for liquor establishments.

[5] As in *Nelson,* the statutory scheme of state regulations does not embrace the area of conduct covered by the Lee County ordinance. We conclude that the ordinance now before us is one directed at the discipline and good order of persons while in establishments selling alcoholic beverages, and does not in any manner interfere or conflict with the state's regulation of the sale of such beverages.

In sum, we have determined the assailed provisions of Ordinance No. 75-9 have a rational basis and represent a valid exercise of Lee County's police power. Further, the acts proscribed by the ordinance represent conduct rather than speech or expression, and as such there is no contravention of the constitutional guarantees of free speech and expression. Finally, we have concluded that the provisions of the ordinance are not in conflict with the Beverage Act.

REVERSED.

McNULTY, Acting C. J., and GRIMES, J., concur.

IN THE DISTRICT COURT OF APPEAL
SECOND DISTRICT
STATE OF FLORIDA

BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, et al,

v.

ROBERT DEXTERHOUSE and ANDY MARTIN,
Appellees.

CASE NO. 76-1442

ASSIGNMENTS OF ERROR

Appellee, ANDY MARTIN, hereby assigns the following as error, and grounds for appeal:

1. The District Court erred in reversing the trial court since the subject ordinance is violative of the First Amendment to the United States Constitution and Article I, Section 4 of the Florida Constitution.

2. The District Court erred in reversing the trial court since the subject ordinance is violative of the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution and of Article I, Section 9, of the Florida Constitution.

3. The District Court erred in reversing the trial court since the subject ordinance is violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

4. The District Court erred in holding that the subject ordinance was a valid and rational exercise of governmental police power.

I HEREBY CERTIFY that a true and correct copy of the foregoing Assignments of Error has been furnished to JULIAN CLARKSON, ESQ., P. O. Box 2112, Fort Myers, Florida 33902; and KENNETH A. JONES, ESQ., P. O. Box 398, Fort Myers, Florida 33902 by regular United States Mail, this 5th day of Oct, 1977.

SMITH & CARTA
Attorneys for Appellee, Martin
Post Office Box 2446
Fort Myers, Florida 33902

By: /s/ Steven Carta
STEVEN CARTA

Andy MARTIN, Appellant,

v.

The BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, Florida, and Frank Wanica, Sheriff of Lee County, Florida, Appellees.

No. 52522.

Supreme Court of Florida.

Oct. 5, 1978.

Rehearing Denied Dec. 8, 1978.

Appeal from District Court of Appeal, Second District.

Steven Carta of Smith & Carta, Fort Myers, for appellant

Julian Clarkson of Holland & Knight, Fort Myers, and James G. Yaeger, County Atty, and Kenneth A. Jones, Asst. County Atty., Fort Myers, for appellees.

PER CURIAM.

We have jurisdiction in this case regarding the constitutionality of a county ordinance prohibiting "topless" dancing because the First Amendment to the Constitution of the United States was construed. Article V, Section 3(b)(1), Florida Constitution.

Because we interpret the opinion of the district court to apply only to the scant facts of this record, we adopt that court's opinion, which is reported at 348 So.2d 916 (Fla.2d DCA 1977).

Accordingly, the decision of the Second District Court of Appeal is affirmed.

It is so ordered.

ENGLAND, C. J., and BOYD, OVERTON, SUNDBERG, HATCHETT and ALDERMAN, JJ., concur.

ADKINS, J., dissents.

IN THE SUPREME COURT OF FLORIDA

FRIDAY, DECEMBER 8, 1978

ANDY MARTIN,	*	
Appellant,	*	
v.	*	**Case No. 52,522**
THE BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, FLORIDA, et al,	*	**DCA Case No. 76-1442**
Appellees.	*	

* * * * * * * * * * * * *

Upon consideration of the Motion for Rehearing filed by attorney for Appellant, and reply thereto,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

ENGLAND, C.J., BOYD, OVERTON, SUNDBERG, HATCHETT and ALDERMAN, JJ., concur. ADKINS, J., dissents.

A True Copy
TEST:

Sid J. White
Clerk, Supreme Court

TC
cc: Hon. William A. Haddad, Clerk
Hon. James R. Adams, Judge
Hon. Sal Geraci, Clerk

Steven Carta, Esquire
Julian Clarkson, Esquire
Kenneth A. Jones, Esquire

By: /s/ Barbara D. Maxwell
Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

ANDY MARTIN,	*	
Appellant,	*	
vs.	*	**No. 52,522**
THE BOARD OF COUNTY COMMISSIONERS OF LEE COUNTY, FLORIDA, and FRANK WANICKA, SHERIFF OF LEE COUNTY, FLORIDA,	*	
Appellees.	*	

* * * * * * * * * * * * *

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that ANDY MARTIN, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Florida, affirming the decision of the District Court of Appeal, Second District, State of Florida, upholding the constitutionality of Lee County, Florida Ordinance 75-9.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

SMITH & CARTA
Attorneys for Appellant
P.O. Box 2446
Fort Myers, FL 33902
813/332-2686

By: /s/ Steven Carta
STEVEN CARTA

STATE OF FLORIDA *
* SS.
COUNTY OF LEE *

The undersigned, being first duly sworn upon his oath, does depose and say:

1. On this 14th day of December, 1978, one copy of this Notice of Appeal to the Supreme Court of the United States was mailed, postage prepaid to counsel for Appellee, JULIAN CLARKSON, ESQ., Post Office Box 2112, Fort Myers, Florida 33902 and KENNETH A. JONES, ESQ., Post Office Box 398, Fort Myers, Florida 33902.

2. All parties required to be served have been served.

FURTHER AFFIANT SAYETH NOT.

/s/ Steven Carta
STEVEN CARTA
Counsel for Appellant

SWORN TO and SUBSCRIBED before me this 14th day of December, 1978.

/s/ Robert Dormer
NOTARY PUBLIC

My Commission Expires:
Notary Public State of Florida at Large
My Commission Expires Aug 22 1980
Bonded thru General Ins Underwriters

EXHIBIT X

ORDINANCE NO. 2550

An ordinance of the City of Boca Raton amending Chapter 4, Article I of the Code of Ordinances; creating Section 4-16 thereof, prohibiting the exposure of private parts or female breasts in an establishment at which alcoholic beverages are offered for sale for consumption on the premises; prohibiting the use of any device or covering which simulates private parts or female breasts in an establishment at which alcoholic beverages are offered for sale for consumption on the premises; prohibiting any person owning, maintaining or operating an establishment at which alcoholic beverages are offered for sale for consumption on the premises from suffering or permitting on the premises of said establishment, the exposure of private parts or female breasts or the use of any device or covering which simulates private parts or female breasts; providing for penalties; repealing Ordinance 2283, City Code Section 15-6.1, relating to the exposure of female breasts in commercial establishments; providing for severability; providing an effective date; providing for codification.

WHEREAS, the City Council of the City of Boca Raton, finds that there is presently in the City an increasing trend toward nude and semi-nude acts, exhibitions, and entertainment, and toward the utilization of nude and semi-nude female employees engaged in other service-oriented aspects of and by the commercial establishments subject hereto; and

WHEREAS, the City Council of Boca Raton finds that there is a relationship between the concurrent consumption of alcoholic beverages and the nude and

semi-nude activities mentioned above prohibited hereunder, and more fully described hereinafter and an increase in unlawful activities, moral degradation and disturbances of the peace and good order of the community, and further finds that the concurrency of these activities is hazardous to the health and safety of those persons in attendance, and harms the general welfare of the community as a whole; and

WHEREAS, the City Council of Boca Raton finds that the competitive commercial exploitation of such nudity is adverse to the public's interest in the quality of life, tone of commerce, and total community environment in the City; and

WHEREAS, The City Council of Boca Raton finds that in order to preserve the public peace and good order, and to safeguard the health, safety and welfare of the community and the citizens hereof, it is necessary and advisable to regulate and restrict the conduct of owners, operators, agents, employees and patrons of the commercial establishments subject hereto; now therefore

THE CITY OF BOCA RATON HEREBY ORDAINS:

Section 1. That City of Boca Raton Code of Ordinances, Chapter 4, Article I, is hereby amended to include Section 4-16, which shall read as follows:

Section 4-16.

(a) It shall be unlawful for any person maintaining, owning or operating a commercial establishment located within the City of Boca Raton, at which alcoholic beverages are offered for sale for consumption on the premises.

(1) To suffer or permit any female person, while on the premises of said commercial establishment, to expose to the public view that area of the human breast at or below the areola thereof.

(2) To suffer or permit any female person, while on the premises of said commercial establishment to employ any device or covering which is intended to give the appearance of or simulate such portions of the human female breast as described in Subsection (a) (1).

(3) To suffer or permit any person, while on the premises of said commercial establishment to expose to public view his or her genitals, pubic area, buttocks, anus or anal cleft or cleavage.

(4) To suffer or permit any person, while on the premises of said commercial establishment, to employ any device or covering which is intended to give the appearance of or simulate the genitals, pubic area, buttocks, anus, anal cleft or cleavage.

(b) It shall be unlawful for any female person, while on the premises of a commercial establishment located within the City of Boca Raton, at which alcoholic beverages are offered for sale for consumption on the premises, to expose to public view that area of the human female breast at or below the areola thereof, or to employ any device or covering which is intended to give the appearance or simulate such areas of the female breast as described herein.

(c) It shall be unlawful for any person, while on the premises of a commercial establishment located within the City of Boca Raton, at which alcoholic beverages are offered for sale for consumption on the premises, to

expose to public view his or her genitals, pubic area, buttocks, anus or anal cleft or cleavage, or to employ any device or covering which is intended to give the appearance of or simulate the genitals, pubic area, buttocks, anus or anal cleft or cleavage.

(d) Any person who shall violate any provision of this ordinance shall be guilty of an offense against the City punishable as provided in Section 1-8, hereof.

(e) If the owner, operator, lessor, lessee, manager, employee or any other person participating in the operation of a commercial establishment located within the City of Boca Raton at which alcoholic beverates are offered for sale or consumption on the premises shall be convicted of any of the offenses designated in subsections (a), (b), or (c) hereof then the City of Boca Raton shall have just cause to revoke the city occupational and alcoholic beverage license for said establishment. Revocation shall be by the City Council at a public hearing giving at least 15 days notice to the holder of the licenses proposed to be revoked.

(f) If at any time the license of an establishment is revoked pursuant to subsection (e) hereof at least 6 months shall elapse before another license may be issued to the same establishment and such license may be issued only after a public hearing on same held before City Council.

Section 2. It is declared to be the legislative intent that if any section, subsection, sentence, clause or provision of this ordinance is held invalid, the remainder of the ordinance shall not be affected.

Section 3. This ordinance shall take effect immediately upon adoption.

Section 4. Ordinance 2283, codified as Section 15-6.1 of the Code of Ordinances, is hereby repealed.

Section 5. Specific authority to codify this ordinance in the City Code of Ordinances is hereby granted.

CITY OF BOCA RATON, FLORIDA

ATTEST:

/s/ Byrd F. Marshall
Byrd F. Marshall, Mayor

/s/ Louise C. Owens
Louise C. Owens, City Clerk

Approved as to form:

INTRODUCED BY Byron.
ON 9/26/78
PUBLIC HEARING 11/14/78

ADOPTED 11/14/78

/s/ R. E.
ROBERT A. EISEN
ASSISTANT CITY ATTORNEY

This is a true copy.

IN WITNESS THEREOF, I hereunto set my hand and affix the Seal of the City of Boca Raton, Florida, this 24th day of November A.D. 1978.

/s/ Louise C. Owens
City Clerk

IN THE UNITED STATES DISTRICT COURT, IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA.

Case No. 78-8391 — Civ - JE

500 VIA DE PALMAS CORP.,
a Florida corporation,

Plaintiff,

vs.

CHARLES A. McCUTCHEON,
individually and as Chief of Boca Raton, Florida, Police Department
and, BYRD MARSHALL,
individually and in his capacity as Mayor of the City of Boca Raton, Florida, and
MARK B. BYRON, III,
JOHN J. MEYER,
JEFFERSON H. MILNER,
AND CASSADY,
individually and as members of the Boca Raton, Florida, City Council,

Defendants.

FILED

JAN 15 1979

Joseph I. Bogart
Clerk, U.S. Dist. Ct.
Southern Dist. of Fla.
Miami, Fla.

JUDGMENT AND PERMANENT INJUNCTION

THIS matter having come before the Court for Trial on the Merits, and the Court finding that it has jurisdiction to entertain the claims of the Plaintiff, and that the Plaintiff has standing to bring said claims, and the Court hearing testimony and argument from the

parties, and further being fully advised in the premises;

NOW, THEREFORE, consistent with the findings and conclusions announced in open Court on December 20, 1978, the Court finds that certain portions of Boca Raton Municipal Ordinance No. 2550 are unconstitutional as violative of the First and Fourteenth Amendments of the United States Constitution. Those Sections found to be unconstitutional are as follows:

1. Section 1(a)(1);
2. Section 1(a)(2);
3. Section 1(b);
4. The Court further finds that the words "buttocks", "anal cleft" or "cleavage" contained in Sections 1(a)(3), 1(a)(4) and 1(c) are unconstitutional.

The above described Sections of said Ordinance which the Court deems to be unconstitutional, shall be severed from the Ordinance, and the rest of the Ordinance shall remain in full force and effect.

IT IS ORDERED that the Defendants, in their official capacity as Police Chief of the City of Boca Raton and members of the City Council of Boca Raton, and the City of Boca Raton in itself, their agents, servants, employees or others acting under their direction and control be, and same are, permanently enjoined from enforcing those Sections of Boca Raton Municipal Ordinance No. 2550 that this Court finds unconstitutional.

DONE AND ORDERED this 15th day of Jan., 1979, in Miami, Florida.

/s/ Joe Eaton

UNITED STATES DISTRICT JUDGE

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 78-8391-Civ-JE

500 VIA DE PALMAS CORP.,
a Florida corporation,

Plaintiff,

vs.

CHARLES A. McCUTCHEON,
individually and as Chief of Boca
Raton, Florida, Police Department
and, BYRD MARSHALL, individually
and in his capacity as Mayor of the
City of Boca Raton, Florida, and
MARK B. BYRON, III,
JOHN J. MEYER,
JEFFERSON H. MILNER,
ANN CASSADY,
individually and as members of the
Boca Raton, Florida, City Council,

Defendants.

U.S. Courthouse
Miami, Florida
December 20, 1978

The above entitled matter came on for hearing before The Honorable JOE EATON, United States District Judge, pursuant to notice.

APPEARANCES:

The above entitled matter came on for hearing

before The Honorable JOE EATON, United States District Judge, pursuant to notice.

APPEARANCES:

BRUCE L. RANDALL, Esq.
On behalf of the Plaintiff,
ROBERT EISEN, Esq.
On behalf of the Defendants.

THE COURT: I want to start by asking the City to assure me that it has made its entire record in this case, factually.

I'll announce ahead of time that the matter came on for preliminary hearing. Under the rule both parties were noticed that the trial, the final hearing was to take place approximately two weeks thereafter.

Testimony was presented.

I am now asking the City whether or not it has in fact presented all the factual background that it meant to present.

MR. EISEN: Your Honor, the only thing that I would say in response to that, I, at the last hearing, I asked the Court to take judicial notice of the type of dancing that is usually done in this, these types of establishments. The Court indicated that it might take judicial notice of that. If the Court will in fact not take judicial notice of the type of dancing performed, specifically in this type establishment or in topless bars in general, then I would like to put Mr. Tipping on the stand briefly, and have him describe the type of performance that occurs in this bar.

THE COURT: Well, now, if I had researched this case

for two days based upon that I would be goad to receive it.

I told you at the last hearing that the Court didn't know what kind of dances went on in topless bars. I don't think it could possibly fit in the judicial notice rule. I am not at all certain that there is some kind of consistency in the type of topless dancing that is performed in barrooms for the purpose of the Court's taking judicial notice. I do note there are a good many cases in the federal system that say that the usual type topless dancing is, in fact, within the First Amendment.

So, the answer to your question, you did not present it but you now wish to reopen to present something on it, is that right?

MR. EISEN: That is correct.

THE COURT: All right, sir, so that gets us into an entirely new factual consideration, to wit: constitutionality as applied. And I have already studied this case carefully. I have done it on the basis of evidence presented at the final hearing, the trial of the case, and I am not prepared now to start again to consider new evidence on the subject.

Now the evidence in this case as I understand it is that these people dance, period.

MR. EISEN: Well, Your Honor—

THE COURT: Is that it, right? They don't touch patrons, they don't touch and simulate fondling of themselves and things of that nature. They dance. Is that basically what the testimony was?

MR. EISEN: That is basically what the complaint said, although I think that categorizing the activity as dance is prejudicial. I think that what they are doing is they are performing and that performance as alleged in

the complaint is that they tastefully remove their top.

And, whether you call that dance or not, I—

THE COURT: Is there evidence in this case, counselor, that these people are dancing? They don't walk around and remove their top and walk off? Talking to counsel for the plaintiff.

MR. RANDALL: Yes, Your Honor, I believe the evidence showed, I believe, that they are dancing. Also showed there is no touching that takes place between any of the customers and any of the dancers or between any of the dancers themselves.

THE COURT: All right. Now just as a matter of interest, do you have some startling evidence you want to produce that would be contrary to the plaintiff's evidence?

MR. EISEN: No, Your Honor.

THE COURT: All right. Now, question number two is this and it is directed to the plaintiff's lawyer. You have some mention in your complaint of an equal protection argument. As I read it you argue only that you were the only bar in town that had topless dancing and they passed this ordinance just to apply to you and therefore it is a denial of equal protection. Have I misinterpreted your position?

MR. RANDALL: Judge, the equal, that is partially the equal protection argument. Essentially, there was evidence that showed that there was, there is only one bar offering this type of entertainment, and therefore the ordinance would be directed just at that particular bar.

We also raised a discrimination type of argument which may be considered equal protection in that—

THE COURT: Well, you did have that language in

your complaint, thereby discriminating against the Plaintiff.

MR. RANDALL: Well, I'm talking specifically about discrimination on the basis of sex, against females.

THE COURT: So you are talking about men versus women as to baring of breasts.

MR. RANDALL: Yes, sir.

THE COURT: But you have no argument as, about discrimination as against equal protection of the law if the city in its police power attempts to regulate this type of dancing only in barrooms? That is not your argument, correct?

MR. RANDALL: Well, we also raised that there was no rational reason for limiting the regulations strictly to places which sell alcoholic beverages on the premises, okay, why, there is no rational reason you know, for that distinction and there is no, an equal protection argument there if you have a similar establishment that doesn't sell alcoholic beverages then they are allowed to dance any way they want.

THE COURT: So you do have an equal protection position. I think it is in your complaint and I believe you made some mention of that in your papers or argument, did you?

MR. RANDALL: Yes, sir.

THE COURT: Do you understand that was one of his positions, counsel?

MR. EISEN: Yes, and I responded in memorandum and I can respond now, if you like me to.

THE COURT: All right. Thirdly, I wish to ask the counsel for the City a very important question, whether you can point to any case in the federal appellate

system where any topless dancing ordinance or regulation has been found constitutional, either on its face, or as applied.

MR. EISEN: Well, I would point to, I believe, the case I gave Your Honor last time, Hodges v. Fidel I believe is the style, I have to look up the cite, but that was what, a district court case.

THE COURT: My question is, I know you have one in Nebraska and I have a later case in Nebraska exactly contra on the district court, perhaps the place from which you found your cite, but in any event my question is can the City point to any case in the federal appellate system from whence districts courts get their directions, not from other Nebraska district courts, which incidentally there are 20 out there in Nebraska, that ruled otherwise, any case at all in the federal appellate courts that uphold a topless ordinance or regulation, topless dancing prohibition, either facially or as applied. Do you have the first federal appellate court case in your favor?

MR. EISEN: I did not find one.

THE COURT: Okay. There isn't one, is there?

MR. EISEN: But I would state that I think the Salem Inn line of cases are supportive of the City's position in this instance although they have of course, ruled those ordinances unconstitutional.

THE COURT: How in the world does any Salem Inn case support you?

MR. EISEN: Your Honor, by implication, they considered anordinance, they found it too broad. They said that it didn't come under the LaRue holding and I believe that the City of Boca Raton does come under the LaRue holding.

THE COURT: Okay. That is my next question.

How in the world does the City take the position that it is exercising Twenty-first Amendment rights?

MR. EISEN: Your Honor, as I stated in the argument before, I don't think that the Twenty-first Amendment question is the key to LaRue. I believe the key to LaRue is the fact that the conduct sought regulated is symbolic speech, that it partakes of minimum First Amendment protections. You have a balancing with state regulations, and in LaRue they balanced the speech aspects there with the intent of the state regulations, and found in favor of the state. I think the Twenty-first Amendment issue was a factor in weighing the two rights but not the determinative factor and it seems to me that when the City is legislating and in this case permissively within the sphere of alcoholic beverage—

THE COURT: Within their police power.

MR. EISEN: Within their police power, within the regulating conduct which is the sphere of alcoholic beverage control, within their police powers, it seems to me to make little difference whether is comes directly from the state as a delegation of alcoholic beverage control or whether in fact it is within the sphere. I think the important point is that in regulating the activity which the United States Supreme Court has found takes on a greater degree of—

THE COURT: My question is, does the City take the position that it is in fact enacting ordinances under, within the authority of the Twenty-first Amendment of the Constitution of the United States.

MR. EISEN: I believe we are for this reason.

The Twenty-first Amendment delegates alcoholic

control to the states. If they look at the state constitution the Florida Constitution, there is no specific provision delegating or limiting that solely to the state.

Now the legislature has taken upon itself to enact comprehensive regulations of alcoholic beverages and in that act they have delegated specific areas of authority to municipalities.

This area of regulation is not within one of those areas.

Also, as a matter of general law, as common law in any area which the state does not regulate the city is free to regulate.

The state—

THE COURT: Well, certainly it is free to legislate and that is what you fellows have done to the Court and confused the issue.

Sure, it is free to regulate. The question isn't, is the exercise of the police power somehow or other contrary to the beverage control law.

It isn't— Just a moment.

The question is whether the City is enacting liquor control regulations within its municipal power to do so.

Their argument that — oh, heck, this isn't contrary to anything in Florida law, therefore the authority has not been usurped by the state liquor control board or Beverage Commissioner — is one set of, one ball of wax.

Certainly it isn't.

That is where you have the police power authority to do it.

But the question of whether or not a city is operating under the grant, the constitutional grant of the Twenty-

first Amendment is an entirely different proposition or whether you are properly within your police power. So just tell me this, just very simple, does the city enact that ordinance under the authority delegated to the state by the Twenty-first Amendment?

MR. EISEN: Through the constitutional home rule powers they do, I believe.

THE COURT: Constitutional home rule powers?

MR. EISEN: That is correct. The constitution delegates to municipalities the authority to regulate in any areas not preempted by either the constitution or state law. We are regulating in an area not preempted by the constitution or state law.

We happen to be dealing in the liquor regulation realm so it seems to me that we are taking that power from the state by lack of preemption and from the constitution. And finally it would seem to me to make little difference whether there was specific grant of authority or not.

The fact is that we are regulating in the area of what, the liquor control, and we are dealing with the same type of factual situation and the same evils and it would seem immaterial whether—

THE COURT: Let me tell you what the materiality is, the Constitution of the United States. That is the only materiality of it because absent the Twenty-first Amendment, there could have been no regulation.

Therefore, the Twenty-first Amendment said the states may do it.

Justice Rehnquist says, makes reference to it in a case which I'll tell you about in a little while. The state may also delegate its liquor control authorities to municipalities if it does it precisely as it has done in

many states which gives rise to a lot of confusion about city ordinances under the Twenty-first Amendment which my friend may or may not have noticed over there.

But the difference is that you can delegate from, by the United States Constitution to states. The United States Constitution didn't delegate it to cities. Then the question is has the state delegated its Twenty-first Amendment control to the city.

That is the three areas with which we are all familiar precisely.

So, the first problem that developed in this case was that they got confused about LaRue which isn't applicable at all in this case and I will point out why in a few minutes, not because it has to do with certain revelries, but because it is a Twenty-first Amendment case, where this one and where the Salem Inn cases were not.

That point was made very clearly by the trial judge the fourth time the City of Hempstead or whatever it was set about to try to ban topless dancing. He said for the first time we now have a new picture, because what happened was the city tried three times under its police power and lost every time.

So finally on its fourth try it got the state beverage department into it. So the state beverage department went down and brought proceedings thereby bringing into play the Twenty-first Amendment.

That is why the trial judge said this is an entirely new matter, entirely different from all of the other cases. So that is the first place that somebody got off on the wrong track on this case, but I think you have answered my questions.

Now, here we will start. Number one, this case does not just have to do with bosoms and anal clefts.

So that the people who are here interested to pass along this information to the public which they figure apparently is considerably interested in those matters, this porceeding is not designed to discuss bosoms and anal clefts.

This case involves the Constitution of the United States, and this Court is called upon to discuss the Constitution of the United States.

It happens that the First Amendment expression involved in this case is topless dancing, and perhaps anal clefts. But this case is about the Constitution, not bosoms.

Secondly, we are not going to be able to meet any deadlines for anybody because I have worked hard on this case and not only am I going to announce the ruling in depth, I am going to do it so as to preserve this research. And I have had at least fifty people call and say when is the Judge going to rule and then we want to know how he ruled.

The answer, the way I ruled is it is going to be ruled on today.

It is going to take a couple of hours and I hope you fellows get a good fee out of it to sit here and listen and if I could tell somebody who called in from the press what the ruling was in two minutes, I would give them a pretty sorry ruling.

I tell these folks when they call that I don't write newspapers and I don't try to reduce constitutional rulings down to a three paragraph announcements and that if he wants to know what the ruling is he has to come down and listen for a couple of hours and that I

can't call them up and repeat it because in the first place I don't have it written out.

It is being given extemporaneously so you folks that are here are going to endure a rather serious discussion of constitutional law and when we are finished if you can reduce that down to generalities, particularly to something that is appropriate and appealing to the reader, that is your job, but mine is to get the job done.

Everybody understands where we stand.

So this is going to be painful for you. You might prefer to leave and have one of these fellows tell you what the ruling was.

But I am not writing for the press, and I am not writing for anything other than the treatment of the constitutional problems involved.

Number one, this case is not a LaRue type case.

This case is not a Twenty-first Amendment consideration type case.

And that is so because the Twenty-first Amendment vests the states with authority under it and it confers something more than the normal state authority over public health, welfare and morals.

As a matter of fact, the cases say that in the Twenty-first Amendment type situation such as LaRue, the LaRue case, there is a rather relaxed standard of constitutionality as distinguished from strict scrutiny standards where the First Amendment and the police power of the city is involved.

We shall discuss that more in a moment.

Now in the first place, the answer to whether or not this is a Twenty-first Amendment case comes from the Supreme Court of Florida, where it is supposed to come from because in the cases where ordinances

similar to this one have been upheld on their face, and I underline on their face, those cases in Florida have to do with the valid exercise of police power of either a county or a city.

In Martin versus the Board of County Commissioners of Lee County, the Supreme Court of Florida said that this ordinance was within the county's police power.

It told us specifically that the statutory scheme of state regulations in the area of liquor control does not embrace the area of conduct covered by the Lee County ordinance. It tells us that the Division of Beverage Control is granted full power to adopt regulations to carry out the beverage laws of this state, and the case tells us that the Court recognizes the limited areas within which local government can legislate.

They say that the local control over establishments selling alcohol is limited to the hours of operation, the location of the business, and sanitation.

However, in the case that we are referring to, the Lee County matter, the Court said that there is a difference between enactments which govern the conduct of individuals as opposed to the regulation of the licenses themselves and the sale and dispensing of alcoholic beverages and that the city or the county does in fact have a right within their police powers to regulate conduct of individuals.

The Florida courts have taken the position in the cases that counsel relies on, as have most of the state courts around the country, that topless dancing is not First Amendment protected.

That it is simply not speech, even though it expresses ideas and opinions.

But in any event we know from the Florida statutory scheme, which is there to read and simple to read, that no authority has been delegated by the state to the municipalities other than that to which we have just referred. The City simply does not have Twenty-first Amendment rights. It has police power rights.

Now, to demonstrate the importance of that, we look to Justice Rehnquist who somehow has become the authority in the country on Twenty-first Amendment liquor control facial validity, and who has been given the responsibility of attending to cases of that nature, apparently. In the Doran v. Salem Inn case 95 S. CT. 2561, which was a '75 case, the Supreme Court of the United States was considering a preliminary injunction that had been granted by the trial judge. This was about the second attempt. This was not the first attempt of the city but the preliminary injunction was upheld in the Court of Appeals and the Supreme Court of the United States entertained it.

And what the Supreme Court was talking about was the possiblity of the likelihood of the plaintiff prevailing in the case below. The Supreme Court determined that the District Court didn't abuse its discretion in granting the preliminary injunction.

And here is what it said.

We are still talking about delegation of authority from states to cities.

The Court, looking back now to the situation in the trial court and considering the question of whether or not there was a likelihood of success on the part of the plaintiff said this.

"Even if we may assume that the State of New York has delegated its authority under the Twenty-first

Amendment to towns such as North Hempstead," meaning that is point number one we would have to consider.

Now, we don't know that from the record, but even if we assume that the state has so delegated its power and that the ordinance would therefore be constitutionally valid under LaRue because of the Twenty-first Amendment, we would, even to get to that, we would have to assume that the state had so delegated it. This would be their, the defense of the plaintiff's case below, because the Court, you remember, is considering whether or not there is a likelihood of, probability of success. So this they said, listen, they haven't reached that point, but even if they have, we had, and even if it could be held constitutionally valid under LaRue, the Twenty-first Amendment case, says this petitioner, does not raise any legitimate state interests that would counterbalance the constitutional protection presumptively afforded to activities which are plainly within the reach of the local law.

Presumptively constitutional protection.

That case was topless dancing.

So the Supreme Court said, look, the first thing we would have to consider before we even thought about the law is whether or not the state had delegated its power to North Hempstead. If it had, and even if LaRue is applicable, a liquor control case, under those circumstances, then the city has not raised anything that would counterbalance its constitutionally protected presumption under the First Amendment.

Meaning that as applied, the plaintiff may prevail in this case because LaRue, as we understand and specially from that announcement, and it is often cited,

does not simply overpower, does not cause the Twenty-first Amendment to overpower all other constitutional considerations.

But at this point we are dwelling upon delegation of power and showing you why this city simply isn't operating under any Twenty-first Amendment right.

Now, before we finish, I am going to show you several cases which fall under Twenty-first Amendment considerations and show you why.

There are a good many that have been discussed here by us and I am going to show you why the Salem Inn cases do not turn in any sense of the word upon LaRue because they turn upon the city's police power.

This ordinance that was enacted by the city is a police power ordinance, not a Twenty-first Amendment ordinance.

In the first place on its face it prohibits conduct. It is not a liquor licensing regulation or liquor control regulation at all. But the city knew that it wasn't and that is why they passed it under their police power and that is the way they should have proceeded.

Now, that brings up to an interesting point which it takes some reading to grasp and I mention it only because we are here for the day and I have a captive audience and I just think it is interesting.

This City of North Hempstead tried three times to pass ordinances under its police power.

The trial judge and the Court of Appeals kept saying that they were too broad.

You remember that the first two times around.

The first time around, it really had to do with respect to people practically anywhere from exposing their bosoms as distinguished from their right arms or their

left arms.

Then the city reduced the scope a little bit.

But you recall they still put in the restaurants and theaters and cabarets, all sorts of things, trying to adjust to the first ruling.

They tried three times before they finally figured, listen, the city can't do it, but perhaps the state can under the Twenty-first Amendment.

And that is when Judge Bartels said this is an entirely different situation and he declined to enter the preliminary injunction the fourth time on a facial challenge.

We must also recognize the great distinction between facially constitutional and constitutional as applied as we read these cases including LaRue, which is not applicable to our situation.

So we wrote in our belief, one of us did, one of you did and I commented upon it quite improperly, that these fellows didn't get the message who were trying to draft those ordinances about preventing them.

Well, the more I have studied this case the more I realize that the city attorney who was employed to try to stop topless dancing, for which he was never successful, really did know what he was doing.

And that brings into play equal protection.

And that brings into play the distinction between state Twenty-first Amendment power and city police power.

Because what the city attorney was obviously trying to do was to avoid an equal protection argument in a police power enactment.

Because he knew he wasn't under the Twenty-first Amendment, and he knew that if he just passed an

ordinance that applied to topless dancing in a bar, that he was going to run directly into the face of the equal protection proposition under the police power.

Because he did not have the Twenty-first Amendment to travel on as the City of North Hempstead because that authority had not been delegated to him by the state, so the city continually attempted to bring the thing within their police power and to avoid the equal protection argument.

So you say, well, that doesn't make sense. It does if you think about it this far because what the federal courts were saying was First Amendment. They were talking about theaters, and artistic presentations and that this thing was too broad within the First Amendment.

Finally when they tried in the City of North Hempstead to reduce the thing down to get past a theatrical production somewhere in the downtown woman's club, there they got over in the equal protection area and this court said you can't do that. The city can't single out a bar and say you can't dance topless there.

Why not other business establishments?

So the people in North Hempstead were doing what they could do within their police power trying to avoid an equal protection argument, knowing they didn't have the Twenty-first Amendment power.

Finally, when they lost, as every one has done to my knowledge that has ever tried to pass a topless dancing ordinance, they have lost absent Twenty-first Amendment, either facially or as applied.

I will tell you something interesting about California when we get to it, and the background of the LaRue case.

In any event, at this point, as rambling as it may be we are trying to show that this is a Salem Inn situation not a LaRue situation, not a Twenty-first Amendment situation at all.

Now, what happened in Salem Inn we all know, and I won't repeat it much more than I have done, much more than I have discussed it already, but we do recognize that this is the police power case.

The only way that LaRue ever becomes confused in a police power case is the courts that are writing in a police power city ordinance case, non-Twenty-first Amendment type case, cite LaRue for the proposition that not every form of entertainment that might be covered by their ordinance is unprotected by the First Amendment. Do you remember that general language?

This is not to say that some of these things that are prohibited may not be protected by the First Amendment. Then they go to talking about modicum of protection, so that that language sneaks into the police power cases to show that First Amendment might be involved, or is involved, depending upon the ruling.

But the Salem Inn cases are the police power cases and that is what we have here.

The final effort was in the broad, very broad statutes, started back in '73. And there the judge first noted what I am telling you all today. That is in the first written opinion by Judge Bartels who managed this proceeding for years. 364 Fed Sup 478,

The judge wrote this, obviously likewise predicated upon the powers of the state liquor authority, has no relevance to the constitutionality of the present ordinance which has no other justification than the exercise of the police powers of the community.

So it didn't come as a surprise to the trial judge on the fourth attempt that they turned to challenge the state regulation, that is that the city brought into play the state power in order to attempt to affect its resutls.

So there at the outset of Salem Inn versus Frank, the judge says, listen, this is not a LaRue type case, it is a city ordinance under the police power which is what this city in the case before this Court has.

There from the beginning, turning to the merits of it, the judge says it is clear that dancing is a form of expression protected by the First Amendment.

That granting of the preliminary injunction went up to the Second Circuit, and that Circuit held that dancing is a form of expression protected by the First Amendment. Even nude dancing, which this isn't in this case before us, can be within the constitutional protection of the First Amendment.

The Court of Appeals, in that first appellate decision in the Salem, Frank and the Salem Inn cases, said that clearly that ordinance as written here would encompass protected expression within its prohibitions. And that protected expression was topless dancing.

Then they made a point which so few people recognize, really. I didn't really think about it until I got to studying this.

"That while the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content as viewed by judges or in quality as viewed by critics, it may not differ in substance from the dance viewed by the person who, having worked overtime for the necessary wherewithal, wants some entertainment with his beer or shot of rye."

Now, you know that sounds like at first reading just

some interesting language that some individual named Oakes wanted to put in an opinion. But it is far more than that.

And here is what it says.

It says that under the police power, as distinguished from Twenty-first Amendment rights to be exercised by the State of Florida, that expression runs between the dancer and the observer.

The First Amendment right that the Court is talking about is not just the right of the dancer to dance, or the owner of the premises to cause the dance for commercial purposes, which we understnad is covered by all the cases. There is no bar to his exercising his First Amendment rights.

But further, and most important and often overlooked, the First Amendment rights have to do with the freedom of communication, freedom of expression as well as the freedom of reception.

So that the city, under its police power, has by majority vote not simply unconstitutionally infringed upon the dancer's right of expression, but rather upon the observer's First Amendment rights as a receptor of expression.

And that is what this nice language means that we read and enjoy sometimes, some of us, I guess, that it may not differ from the dance viewed by the person who, having worked overtime for the necessities of life, wants some entertainment with his beer.

Now, what they are really talking about there is equal protection and First Amendment.

The cases that somehow say "Hair" is all right because it is First Amendment, turns on First Amendment, freedom of expression, because viewers

want to see it, and it is an expression and it is communication between viewer and the performers of Hair.

But what the case is saying is that same situation under the First Amendment exists whether it is in a barroom or a theater because the folks that can afford it might prefer to go to see "Hair," but the fellow who drinks a beer after work might get his expression in a barroom.

So that First Amendment does not just run to the dancer or to the individual who is operating the commercial establishments.

Now, comes the message in this case that has absolutely nothing to do with the law, but I sometimes find that even in talking about bosoms and anal clefts, that the law is tremendously interesting when you have the time to study it, and here is a little background that you might appreciate.

The court of appeals judge who wrote Salem Inn versus Frank, the one that we are now discussing about the fellow down in the barroom, speaking of First Amendment and equal protection, is a Vermonter. He is the attorney general, or was the attorney general of the state of Vermont and wrote this on the Court of Appeals for the Second Circuit. And here is the key to this case.

One must be careful in making judgments in this area, speaking of First and equal protection, First and Fourteenth Amendment as to expression.

"One must be careful in making judgments in this area to avoid permitting judgments of taste to become rules of law."

I think that is a right profound statement coming from him.

Although it has no bearing on the law, people like to look into a judge's individual background for whatever it is. I mention former attorney general of all the states of all, the State of Vermont.

So, later I shall show you the cases where the Twenty-first Amendment comes into play and tell you why that even if the Twenty-first Amendment were applicable here, even if the court is wrong which it isn't, but in the interest of covering the whole subject I am going to tell you why even if the Twenty-first Amendment was applicable here, this ordinance is both facially and constitutionally unconstitutional as applied as has to do with one section and one section only which I shall come to in a moment.

I guess by now that you folks have discerned that this is an ordinance which is going to be upheld under the police power, under severability because the only portion of it which is facially unconstitutional under the police power or under the Twenty-first Amendment or unconstitutional as applied has to do with topless dancing and anal clefts and that phrase which we will get to a moment. The rest of this ordinance withstands constitutional challenge for the reason that I will mention in a moment.

Well, we left off with the discussion of the first effort under—of the city to get rid of Frank Doran, the Salem Inn establishments.

We have noted that it was on that first effort that we arrived first at the Supreme Court of the United States and there, under the Twenty-first Amendment discussion, assuming that it applied the court said that activity within that local ordinance was plainly within the constitutional protection afforded under the First Amendment which was topless dancing.

Now we took a second try up in the city, in New York state, and there as counsel advised us on the second attempt, the Court, the city tried to limit the scope of its ordinance to some extent, getting over the equal protection problems but attempting to avoid First Amendment problems.

It is interesting to note that in the ordinance itself, the New Hemptstead ordinance, under its town code, that is, the following appears in the footnote in that case.

"The Board finds that it is solely within the powers of the State of New York as delegated to the State Liquor Authority," which it is in Florida according to the Florida Supreme Court, "to regulate and control the manufacture, sale and distribution of alcoholic beverages."

And that they could, those purposes which were solely within the power of the state should be augmented in a way not inconsistent with that state power, which is what the people in Lee County did by local regulation of conduct of persons engaged in the sale of, to the public, of food and drink and alcoholic beverages, and those persons in their employ. So they said, listen, we realize that we do not have a Twenty-first amendment situation here, that is solely the state's, but we do have police power having to do with conduct.

Therefore, they enacted another ordinance.

The judge, who now on the district level had become efficient in the area, he got the case back probably from one of his brother judges.

Interestingly enough, Judge Bartels at the time he wrote these opinions was about 80 years old, which I find to be interesting also, the Salem Inn cases granting

the injunctions. Because he is reading the law, he wasn't going back into his youth. He was reading the law. So the judge himself who wrote it said, "It may best be characterized," talking about this particular dance, "as an exhibition of female breasts to attract bar customers."

That is how he described the expression involved in that case, the judge who granted the preliminary injunction.

"Thus," he says, "we are constrained to hold once again" and he says, "and we might add reluctantly," said the old judge, "that the attempt of the Town of North Hempstead to prohibit topless dancing is on its face violative of the plaintiff's rights under the First Amendment since it includes within its prohibition constitutionally protected expression," referring to what, topless dancing.

Now that case, again, went to the Second Circuit.

You realize that this was a second attempt.

Supreme Court of the United States had already upheld the granting of the preliminary injunction on the first attempt, not on its merits, but rather on upholding the discretion of the trial judge to grant the ordinance, grant the preliminary injunction under the circumstances.

Now, this was the second attempt. Well, the trial judge said that, fellows under your police power, you simply don't have the right to legislate in the area of taste, whether the expression that is being made is tasteful or not and that it, this dancing, this topless dancing is entitled to First Amendment protections.

The case went up to the Second Circuit and again, Judge Oakes my, our Vermont friend wrote this opinion.

He again in the footnote states that it is solely within the power of the State of New York as delegated to the state liquor authority to regulate and this thing is a police power ordinance. It appears in the footnote quoting the ordinance itself.

And then the Court wrote this after permanent injunction had been granted by the Court below. The Court of Appeal wrote this, said that the trial judge entered a summary judgment, permanent injunction, holding that the revised ordinance was still subject to the constitutional vice of First Amendment overbreadth since its sweep includes communicative dancing. Judge Bartels also considered the ordinance to be in violation of the equal protection clause of the Fourteenth Amendment because burlesque theaters might legally operate while others could not, a cabaret could not stage a production, and here is the definitive ruling in all of the courts of appeal on this very question.

It is referred to in the Supreme Court of Florida, cases that counsel cites me, where Florida rejects it and says we don't really need to worry about the constitution as determined by federal courts, the federal constitution. We do not have to follow any federal courts.

Well, interestingly enough I do.

So that really is the answer to your whole case.

Because this is a federal court. State courts simply say this isn't expression.

It isn't First Amendment even if the federal courts all over the country say it is.

Well, this is a federal court and that is the answer to your question.

Here is the definitive ruling which is, I'll refer to later, in the only Fifth circuit case I can give you on this subject.

Court of Appeals says Judge Bartels found that this ordinance was not justified under any Twenty-first Amendment state power because, it is not involved, there is not involved the kind of conduct properly subject to regulation as a phase of liquor licensing.

So there the Court of Appeals says again the city under its police power does not operate under the Twenty-first Amendment.

They say we agree with Judge Bartels and affirmed him.

Then they are discussing the sweep of the ordinance. This is a Court of Appeals on the second attempt by the City of New Hempstead. "We recognize there is only a modicum of expression involved in the conduct of appellees dancers," topless go-go girls I add, "but that modicum is one of constitutional significance, both to the dancers who earn a livelihood by providing their particular form of entertainment, and, perhaps more, to the customers of the appellees establishment who for a variety of reasons, which may include the lack of economic means or mere differences in inclination, choose not to avail themselves of diversions deemed more tasteful or culturally rewarding than others."

"Judge Bartels," the Court says, "correctly devined our meaning by this that, however much topless dancing may be regarded by some to be in the teeth of good taste, it is, on the record here, a harmless form of diversion or entertainment, by way of communication from one human being to others.

"That interchange of communication is subject to

constitutional protection, so long as some legitimate interest of the State or others is not infringed upon."

The Court went on to say that, the town has failed to show any legitimate underlying municipal interest to which its discrimination among various commercial establishments could be rationally related," which as to do with your equal protection proposition.

"The town," wrote the court, "is between the Scylla of overbreadth and the Charybdis of unequal protection."

The town is between this problem of overbreadth and equal protection, which is what I started out to telling you all about the City of North Hempstead moving, trying to move in the middle.

"This is because it is attempting to regulate matters which the First Amendment leaves to personal choice."

So there is a case that is precisely our case.

I now turn, because it is in that same context, to Fifth Circuit matters. In the first place, there hasn't been a lot of Fifth Circuit bosom cases.

I expect the reason for that is Younger v. Harris which we do not have in this case.

In this case before this Court, there is no pending prosecution, there is no pending state case because counsel for the plaintiff somehow or other has very wisely avoided Younger v. Harris.

There is, however, clear evidence in the case of an immediate threat of prosecution, thereby giving rise to the ripeness of this matter and causing, giving rise to our having worked on it rather carefully.

Second reason is that the states have not seen fit to attempt to get rid of topless dancing.

And the states therefore, have not brought into play

the Twenty-first Amendment rights.

The State of Florida has not. Only two or three municipalities have attempted to do it within their police power.

Now, my friend who is representing the City read the,—incidently the derivation of the ordinance that you took in Lee County appears throughout all these cases I'm citing. You will see where it came from when you read these cases.

My friend from the City has taken the Lee County ordinance, which the State of Florida through its Supreme Court says is all right because it is within the police power because it doesn't infringe on First Amendment, and drawn an ordinance which could have given rise, if anyone had been arrested under it, to a challenge where the federal constitutionality would have had to have been raised in the state court and the city attorney could simply have shown this carefully drawn ordinance, threw the two Florida cases up on the desk and he would have been in good shape.

That is the simple answer to this.

If the city somehow or other would have federal constitutional questions always decided in first amendment areas by the Florida courts, they would be all right because Florida says this isn't an expression.

But, counsel for the plaintiff, having avoided Younger v. Harris, having avoided, although he has got a civil rights case here, you see, among other matters, having managed to have his people immediately threatened but not arrested, he somehow or other gets the United States courts to construe the United States Constitution and they say without exception that such expression is a First Amendment expression.

Now I want to you to bear in mind that we are still

talking about facial validity.

We haven't even got to constitutionality as applied here. We are going to get into that in a few minutes.

We start, then, with the language in LaRue.

Well, let's don't get on applied yet, let's cover the rest of Salem Inn where the people who were opposing the city prevailed throughout.

We come down then to they prevailed throughout as against the city, then we come down to 1976, when the city got the state involved.

The State Liquor Control people began to get active because they had some sort of provision in their control law about disorderly conduct and indecent conduct in licensed premises.

So, the city, having been thwarted by the United States Constitution and the First Amendment and the Fourteenth Amendment, then said all right, suppose we bring into play the Twenty-first Amendment which the City of Pompano Beach cannot do. Unless, City of Boca Raton, unless it gets the State Beverage Department involved.

This incidently had to do with topless and bottomless dancing.

But we still got the top of the Areola involved here in the ordinance and there is where the turn came in history of the Salem Inn, because the same fine old district judge who had consistently upheld the First Amendment declined to enter a preliminary injunction because he said at the threshold these statutes don't prohibit nude or topless dancing except upon premises licensed to sell alcoholic beverages and thus this case is entirely different from Doran versus Salem Inn where local ordinances, local ordinances attempted to prohibit topless dancing, et cetera.

Here a new element had been introduced predicated upon the Twenty-first Amendment to regulate the sale and distribution of alcoholic beverages. The Twenty-first Amendment specifically authorizes a broader power of regulation in connection with the sale of alcoholic beverages which was absent in the three prior Salem Inn challenges.

The district judge held that the position of Salem Inn was such that a three judge court ought to be constituted but that as the individual judge on the three judge panel which gave rise to empanelling the three judge panel he declined to enter the injunction, showing the difference between the state liquor control regulation being under attack bringing into play the Twenty-first Amendment and a police power ordinance.

That case went, as far as I am able to determine and I am sure that I have checked it out carefully, down only to the point where the three judge court ruled, the one which Judge Bartels was of course a member. He was the judge before whom the case fell originally, and the Court said there that because there was an appeal pending in the New York State courts, which of course is not here, discussing Younger v. Harris and the other civil cases, that they weren't going to rule on it because the appeal was pending and I think that was an entirely proper ruling.

And he said that the Inn hasn't been charged with a violation of Rule 36 and it wasn't ripe because there was no immediate threat of enforcement against them and that is why you introduced the testimony that you introduced in this case.

So the end result as far as I am able to determine it is

that once the state brought into play the Twenty-first Amendment Salem Inn didn't get its injunction and whatever happened in the state Court of Appeal I don't know.

Now, let me show you some cases that clearly point up the difference in the Twenty-first Amendment case.

1977 case in the Ninth Circuit, Richter versus Alcoholic Beverage Control of the State of California which as an affirmance of a denial of a preliminary injunction. This was against the State of California as alcoholic beverage control people, a Twenty-first Amendment case.

They held that on its face in consideration of the Twenty-first Amendment, that particular ordinance could stand constitutional scrutiny on its face, specifically left open whether or not as applied, it might be held unconstitutional.

There is a recent case in the Eighth Circuit, a 1978 case, incidentally, November the 13th, 1978. Right there.

It has to do with the tops of areola. I never knew what that was either until a couple of weeks ago.

This bears strongly upon whether or not liquor control law is distinguished from police power city ordinance and this court said that the Twenty-first Amendment conferred something more upon a state than the normal operation of police power, but here is the important thing about the case. It starts out with this sentence.

"It is important to note at the outset that this case is before us in the context of the city's regulatory powers over intoxicating liquors within its borders," and if you read it you will see there is a delegated situation in that particular case.

I want you to read sometime Clark versus the City of Freemont just for fun. That is a 1973 Nebraska case in the District Court which went into great detail on our subject and I won't get into it in depth because I am taking too much time.

But you will find that that district judge far from agreed with his brother who you wanted to cite me.

Another case to read is Felix versus Young.

That is a case that talks about the strict scrutiny and the relaxed standards under LaRue.

Felix v. Young is 536 Fed 2d. 1126.

That case specifically says that the Michigan law authorizes the city to locate places for dispensing liquor. That was a zoning situation where, in that case, you couldn't have a topless bar if it was a thousand, within a thousand feet from two other such establishments or something of that nature. They were not attempting to prohibit the conduct but they were localizing it and, in localizing it, they were under their authority to zone, zoning the things.

In that City of Freemont case, the District Court of Nebraska, the state had specifically delegated the powers to the municipality.

It was a LaRue case and the court ruled the topless part of the thing unconstitutional on its face.

I believe that if you check all the cases carefully, you will find that municipal ordinances absent a delegation of power do not enjoy Twenty-first Amendment protection.

They certainly do if they have been delegated the power.

The scope of sovereignty delegated to municipal courts cannot be enlarged by a liberal construction.

The powers conferred upon municipalities by the state are strictly construed.

Water, Light, and Gas company versus Hitchenson 28 Supreme Court 135, and a great many cases, state and federal, cited in footnote 6, on page 248 at section 195, Municipal Corporations AmJur 2d. I won't read you all the cites, but the point is that there has been no such delegation and we know that from reading the statutes and we know it from the Supreme Court's opinion which I have cited.

Now, I do want to discuss a couple of interesting points with you.

I want to talk to you about LaRue because it got involved in our discussions and because my friend from the City of Boca Raton says that there have been some—it is so close to being all right if it has to do with liquor that the City must have Twenty-first Amendment considerations—and I assume that he says that in good faith, so let's consider the results even if LaRue applied.

In the first place LaRue upheld, considering the Twenty-first Amendment, the ordinance that it upheld on its face.

And it said that in the posture of that case, considering it facially, it could not be said that there wasn't substantial justification for it under the Twenty-first Amendment and it was all right; but it said, however, justification.

The admonition contained in the Court's opinion, SeaGram & Sons versus Hostetter, is equally in point here. This is LaRue now, 1972 case, California.

"Although it is possible that specific future applications may engender concrete problems of constitution-

al dimension, it will be time enough to consider any such problems when they arise. Because of the posture of this case, we deal here only with the statute on its face. And we hold that, so considered, the legislation is unconstitutionally valid." They say that at least some of these performances to which these regulations address themselves are within the limit of the constitutional protection of freedom of expression. This being a Twenty-first Amendment case, on its face, it is all right.

Now, when we come to the question of as applied and you get over in the area of some of these methods of conduct that the law ruled out, we are going to have some constitutional problems. That is all that LaRue says to us. It doesn't have anything to do with the application of the regulation.

Now, here is something that is very interesting to me.

This case, which is so often discussed in matters of ordinance that include topless dancing, and that is so because ordinances generally include more than that, prohibit more than that, as does the one before this Court, the interesting thing about LaRue is that it, didn't have a thing in the world to do with topless dancing.

Nothing.

It prohibited acts or simulated acts of sexual intercourse, masturbation, sodomy or oral copulation, touching, caressing, fondling of breasts and buttocks, et cetera, displays of the vulva and genitals; didn't, specifically left out topless dancing.

So that all of this discussion by the Court that some of these things we are going to have a problem with in the future constitutionally because they may well be

within First Amendment protections are those things that I just read, not topless dancing.

Now if any of these may well be as entertainment or First Amendment expressions, constitutionally protected, well certainly topless dancing is. The point is that LaRue didn't have anything to do with topless dancing.

Before I go further with that and show you the interesting thing about the State of California, I want to mention one thing that comes to my mind that has to do with how LaRue is generally discussed.

We even see in one of the cases which I will cite to you where Judge McCree, who I believe now is the, what is he now, solicitor general, wrote a dissent in the Detroit case where the city had been delegated Twenty-first Amendment rights.

And he is talking about LaRue and he gets into this language about gross sexuality as distinguished from mere dancing, topless dancing, that sort of thing.

And three or four of these cases which I'll cite in a moment without discussing this point specifically get into the discussion that says I think this balancing really has to do with comparing gross sexuality with what is occuring in this instance and that sort of thing.

Well, one of the courts and I will tell you what it was in a moment said, no, that is not the problem under the Twenty-first Amendment.

Well, after some study I have come to understand what all those cases are really trying to say, at least I think I do.

They are really trying to say whether or not what is happening is expression, as distinguished from some gross sexual acts, you follow me. They are really

dealing with whether or not what is happening is a First Amendment right, and one of cases which I will cite to clarify that in a moment but what LaRue stands for is discussed in every case. It really stands for the proposition that the state under the Twenty-first Amendment, or municipalities if it has been specifically delegated, the state authority may pass broad prophylactic measures reference the sale of whiskey and liquor license rights. And facially they are all right.

But there is a limit to it. They don't overpower other constitutional rights and you have to consider each matter as it comes up, as to whether or not that particular regulation as applied, violates the First Amendment. That is what this LaRue case says.

Now, I am almost finished. It won't be but another moment here.

I want to now show you something interesting that happened in California. Richter in August, 1977, the United States Court of Appeals in the Ninth Circuit wrote an opinion in this general area, Richter versus Department of Alcoholic Beverage Control, the State of California. Did either one of you cite that case?

All right, 559 F. 2d 168.

That case which a Twenty-first Amendment case, State of California, determined that the particular ordinances were facially constitutional.

What had happened in this case, was, that case, was that the state set out against these folks.

They said that LaRue had determined only the facial constitutionality of a similar statute, said that because of the posture of the case they haven't dealt with it except on its face, and in general followed LaRue and said the statute was facially constitutional.

Now here is the interesting thing I want to point out to you, just because it is interesting and has no profound effect on this opinion.

In LaRue the portions that were declared unconstitutional had to do with acts of masturbation, sodomy, et cetera, as entertainment, genitals and anuses, actual or simulated, actual or simulated. This was a California state regulation, in the LaRue case.

Then, when 1977 came around, which is five years later, the State of California had revised its regulations to some extent.

It took out simulated. It took out the provision that was there in LaRue that had to do with displaying films or pictures because they were concerned of course about Miller and about hearings ahead of time.

And they took out simulate, and left in all of the other provisions that were present in the ordinance or the regulation, that is, that was there when LaRue was written.

The interesting thing about this is that the California plan never did prohibit topless dancing.

None of the cases that came out of California ever had anything to do with topless dancing, including LaRue.

So that these hundreds of references to these things that maybe within the protection of the First Amendment consistently are talking about acts of bestiality, oral copulation, and caressing anuses and things of that nature.

So how we are looking to LaRue always for topless dancing I will never know because it never was, apparently, prohibited in the State of California.

We come to the Fifth Circuit situation, as I told you I

would some day, and I find only that as far as being able to cite anything directly on this area, in the area of First Amendment, a three judge court, district court case. Judge Gee of the Circuit Court was in fact a circuit judge on that three judge court.

This is Kew versus Senter 416 Fed.Sup. 1101, 1976.

This case has to do with the plaintiff's assorted First amendment rights to dance naked in public barrooms.

The case grows out of efforts by Texas Alcoholic Beverage Commission and the City of Lubbock working with them as they were doing up in Hempstead I guess, to bring criminal and administrative actions against certain individuals involved in topless and bottomless dancing in establishments that had a beverage permit.

The plaintiff alleged that certain sections of the code, the Texas penal code, the Texas statute, was unconstitutionally facially and as applied to nude dancing, First and Fourteenth Amendment.

So this is topless and bottomless.

Now the Texas penal code had to do with what they called indecent exposure, exposing anuses, genitals, offensive gestures, et cetera.

The Court considered the facial challenge and on the overbreadth challenge said it wasn't compelling.

"The behavior condemned here," speaking of the ordinance, or state statute, "falls so far down the scale towards conduct as that treated by these statutes and so far from pure speech, that the overbreadth analysis becomes quite restrictive."

So there we are talking about the scale that counsel wants to talk about.

They say that Doran, now this is the interesting

thing about the three judge case, Doran, the one that I read you a while ago, the sole controlling authority cited to us, is readily distinguishable from Kew versus Senter.

It involves an ordinance making unlawful mere public display of the female bosom by entertainers and says that is what distinguishes this situation from Doran. Doran only has to do merely with the public display of the female bosom by entertainers, et cetera.

The conduct which is condemned here is far more extreme, being in some instances of a sort which approaches if not reaches the actually obscene.

The statutes in question are primarily directed at conduct and of only incidental impact on speech.

There was considerable evidence in that case. They say it is difficult to conceive of ideas entitled to First amendment protection which can be solely or even at best expressed by baring the anus or genitals in the circumstances forbidden by the this statute.

This person was dispensing liquor and everything else while nude. So, what this case is saying is that in this Twenty-first Amendment type case, the statute is constitutional because it is not like Doran, which merely had to do with the exposing bosoms in topless dancing as distinguished from what was happening in this particular case.

So there is a case that you might be interested in. I gave you the cite on it, didn't I?

Now, let's assume for a moment that the Court is wrong and that this is somehow or other a contest between Twenty-first Amendment and First Amendment equal protection.

There is a long line of Fifth Circuit cases, Parks versus Allen, 409 fed. 2d 210.

Liggett, Atlanta Dowling Center, Hornsby and Allen and others, that have to do with regulation of sales of liquor, to do with Twenty-first Amendment matters involving state regulations where the Court, the Fifth Circuit, has held that the liquor licensing procedures themselves were unreasonable and in violation of due process and equal protection.

So the point is that, as expressed throughout the cases, merely because the Twenty-first Amendment is applicable, if it were here, does not mean that you don't have to have some balancing as counsel suggests and I will get into the test of that in a moment.

In view of the fact that I am talking about Parks v. Allen, I will tell you what happened in that case and it is the truth, a true statement.

This case went up and the Fifth Circuit said that there was scant evidence in this regard, as to the reasonableness of the classifications involved in the city ordinance of Atlanta. That was one where they said that they couldn't have two Liquor licenses in one family.

One family is entitled to one liquor license; brothers couldn't hold separate liquor licenses.

The Court said since a determination of the constitutional infirmity of a city ordinance is necessarily a serious matter, we are reluctant to undertake this step without benefit of a well developed record. We remand to the district court for further development of the record on the reasonableness of limiting liquor licenses to one in a family.

Now the only importance of that case is that even if it were a Twenty-first Amendment matter, which it is not, it does not simply ride roughshod over equal protection and First Amendment rights, and that if it were that it

would bring into play the test that I think we got originally from O'Brien which the state courts like to cite.

I don't mean just the State of Florida but cited in many state courts. We will talk about it in a minute.

As you remember this was the case where the young fellow burned his draft card.

He was prosecuted in the federal system for having burned his draft card and he said this was a form of speech.

The Court made the statement which is jumped upon by folks who like it, written by Justice Warren, incidentally. This case is certainly correct not only because it is the Supreme Court but because it had to be that way and it is right.

The Court said that, not every conduct, we are not prepared to accept the proposition that everything that somebody said is designed to communicate is speech.

At that point folks who like that quote stop.

But then it talked about a situation where there is an element of speech and conduct combined, not meaning that a fellow had to be talking when he was burning his draft card but he was conveying messages but it was also conduct.

Here in considering topless dancing it is conduct and it is a conveyance of an expression, as we have already held.

There, the Court handed down the test which we see cited in many cases.

Where speech and non-speech elements are combined in the same course of conduct, I say elements, one, the fellow was getting rid of his draft card, two, he was expressing an idea, his opposition to the Vietnam War and to the draft, a sufficiently important govern-

mental interest in regulating the non-speech elements can justify incidental limitations on First Amendment freedoms.

Now, bear in mind that we are now discussing a situation in the interest of completing the ruling. Even if the Twenty-first Amendment were applicable as the city says it is, this ordinance as to the part I am going to mention precisely in a moment could not stand under the facts of this case.

Here is the meaning of the term sufficiently justified, that is that the governmental interest is sufficiently important, regulating the non-speech elements, the topless dancing, the conduct, whether that can limit First Amendment freedoms. Here is the governmental test.

Sufficiently justified if it is within the constitutional power of the government. Two, it furthers an important substantial governmental interest and three, and this would be fatal to the city's case even if the Twenty-first Amendment applied as to topless dancing and the other matters that I mentioned, three, the governmental interest is unrelated to the suppression of free expression.

The governmental interest is unrelated to the suppression of free expression.

And four, the limitation on the First Amendment freedom is no greater than is essential to the furtherance of that interest.

Now the people, the Courts that cite O'Brien and say that it just simply stands for the fact that dancing is not speech, simply do not correctly cite O'Brien.

What O'Brien is saying is that sure, this fellow was expressing himself.

And part of his conduct was First Amendment.

However, if there is a sufficient substantial important governmental interest in regulating the non-speech element, that is the tearing up of the card, it can be done constitutionally, but not if the governmental interest is related to the suppression of free expression.

In other words what is says in this case was, okay he is expressing himself but you have to have draft cards in the United States under these circumstances to carry out the entire process of the federal position. People have to register. They have to have their draft cards. There are million purposes for which they are used, and therefore that is such a substantial governmental interest, that whatever expression came out of his burning it is incidental to his having torn up his draft card.

And therefore, the government interest is unrelated to free expression and a denial of free expression. It is interested in keeping draft cards around because they are vital to the government operation.

Here the interest of the city is in fact directly related because its very purpose is shown in the preamble to the topless dancing which is the expression itself, you see, so that under that test, the city could not meet, simply could not meet it.

Now, we finally come to the most important point evidentiarywise.

If LaRue were applicable, if it was a Twenty-first Amendment type situation, we look to the record to see what governmental interest has been presented by the city.

Just as in the Supreme Court treatment of LaRue, not LaRue, I beg your pardon, of the Salem Inn case, where Justice Rehnquist in anticipating possibilities of

prevailing said the petitioner doesn't raise any other legitimate state interests which would counterbalance the constitutional protection.

In most of these cases on the Twenty-first Amendment, there are public hearings and this evidence presented before the liquor control board and all sort of stuff about bestiality and rapes that you find in those, in all these cases; but we look here to the evidence in this case, as the Fifth Circuit tells us we have to do in the case that I mentioned about First Amendment and twenty-first amendment cases or equal protection cases, to see what has been advanced to governmentally justify infringement on First Amendment rights, speaking of the First Amendment.

The evidence in this case, as I recall it, is that a nice man here who was a police officer, a sergeant, he opined that, and I am not quoting him because I am only recalling it, we believe that motorcycle gangs like to get their girls in places like this, which, would somebody like to correct my recollection?

MR. EISEN: That is accurate.

THE COURT: That is accurate. A new one. That is not very probative.

I don't know what motorcycle gangs are supposed to denote. I see gangs of motorcyclists every Sunday afternoon when I come home from the river fishing.

I guess it is supposed to conjure up some sort of image of big black belts beating people against oak trees or something like that, I remember about ten or 15 years ago about a motorcycle gang.

Now, the point is the evidence, motorcycle gangs we think might want to get their people in here, well, of course, that is not evidence of such justification as to

overcome the First Amendment right which we have discussed.

If the city as a matter of fact could have shown factually some tie-in between freedom of expression, meaning the receivers in the bar as well as the dancers and shown somehow or other that motorcycle terrorists somehow had invaded the place through naked bosoms we would be over in the area somewhere of counterbalancing First Amendment rights.

Well, obviously that statement does not rise to the quantum of the showing necessary to override First Amendment protections.

So that even if LaRue were applicable, this portion of the ordinance would be unconstitutional as applied to these particular plaintiffs, this particular plaintiff.

Now there is no need to recite the mere fact that somebody is employing people commercially to make a dollar denies them his right to bring the action. I think that is absolutely clear in all the cases and some of them which I have cited including Doran.

And merely because the dancers are dancing to earn money, that doesn't take it out of the area of First Amendment rights.

And because somebody is buying beer and paying for it, that doesn't take their First Amendment rights away from them.

So I think that we have pretty largely covered the situation already but we simply leave it at that because it is obvious that this plaintiff had standing and the commercial activity does not deprive any one of a First Amendment right of expression.

Now, as to equal protection, this ordinance on its face, as has to do with the particular area that I shall read in a moment, denies equal protection.

If it were in fact a Twenty-first Amendment case, it

would not because the Twenty-first Amendment actually takes out of equal protection those persons who operate bars.

That is what the Twenty-first Amendment is all about.

But just like the people in North Hempstead, if you are not operating under the protection of the Twenty-first Amendment which allows you to zero in on bars as the State of Florida could, then you are faced with equal protection. You are not talking about liquor, you are talking about how come Smith can't have topless dancing when other people down the street can.

Well, the only answer in the world to that is Twenty-first Amendment which is not applicable here for the reasons that we have pointed out, by the city, therefore, just as was the holding in the Kew case.

Well, in any event, I recall it well enough to tell you that the Court finds that the remaining portions of this ordinance other than the ones which we will discuss precisely in a moment, fall within the general reasoning and ruling of the three judge court in the Fifth Circuit in the Kew case and the Court although not bound by that decision accepts it as being sound.

And the important thing is that the Kew case did not have to do with those things which are restricted by the portion of the ordinance that the Court is going to declare constitutional in this case. The Court specifically pointed it out that they didn't and distinguished that situation after a full trial on the record from the Salem Inn cases.

Accordingly let's get a copy of the statute, of the ordinance out if you please, sir.

The Court finds that a portion of this ordinance is unconstitutional on its face and as applied after consideration of the facts and the record in this case

and of the sparse evidence presented by the city to justify it. That portion of the ordinance which is unconstitutional is that portion which reads as follows:

Section one, which reads that "the City of Boca Raton board of ordinances is hereby amended to include section 4-16 which shall read as follows: we—" that, of course is not unconstitutional. I am simply leading up to the sections that are. Now we have section 4-16.

Number one, which reads, "to suffer, permit any female person, while on the premises of said commercial establishments to expose to public view that area of the human breast at or below the areola thereof."

Number two, it is unconstitutional on its face and as applied is violative of the equal protection and the First Amendment.

Now in number four the words anal cleft as included within that sentence must be removed from that ordinance for the same constitutional reasons already expressed.

Now I understand that in part of the dance, part of the expression, bosoms are exposed and anal cleft. Is that what your evidence showed? That is what your complaint read?

MR. EISEN: We show bosoms.

MR. RANDALL: Buttocks and anal cleft.

THE COURT: Bosoms and buttocks and anal cleft.

And that is what your evidence had to do with. The evidence was that there is clothing on that portion of the body but the behind and the cleft shows right?

MR. RANDALL: Yes, sir.

THE COURT: Although there is some drapery over the thing like a a bikini bathing suit of come nature.

MR. RANDALL: I believe they are commonly referred to as G, G string. They are not entirely

bottomless.

THE COURT: Both buttocks and anal cleft come within the evidence, and are within the constitutional ruling and that is in number four.

MR. RANDALL: May I interrupt you for a second, Judge. Are you saying that both buttocks and anal cleft are out?

THE COURT: Anal cleft or cleavage.

MR. RANDALL: Buttocks, anal cleft or cleavage?

THE COURT: That's right. When we get down to it remind me. I believe that question is simply a restriction against the female herself consistent with the one above which has to do with permitting or suffering it, right?

MR. EISEN: That's right.

THE COURT: Right, so that B follows A-1, and it is subject to the same ruling, of course.

Little C in section one follows the three and four provisions above, I believe.

And the same ruling there.

I am going to let you draw me up something on this in a moment. Buttocks, anal cleft or cleavage, that is the number in letter C, and that also applies to the latter portion of that sentence in C about simulating buttocks or anal clefts or cleavage.

Now, I believe that that covers the entire ordinance consistent with this ruling doesn't it?

MR. RANDALL: Judge, I believe you skipped over section three.

MR. EISEN: It is essentially the same as four.

MR. RANDALL: I assume three are one and the same as four. I believe you skipped over it.

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: As to A three under section 4-16, the same terms are constitutionally improper and that has to do with buttocks, anal cleft and cleavage.

And that is in four, right. Subsection four.

We will get it down precisely in a moment.

Now you gentleman will see that if you read the Kew case where Judge Gee was the circuit judge on it, that according to the language of that case whether you are talking about police power or Twenty-first Amendment when you go to talking about genitals and anuses and pubic areas, et cetera, according to that three judge court you are not, you have gone down the scale to the point where you are not talking about First Amendment rights and that consistent with that case is the holding here.

That then means that the question of severability has to come up and I will just take a minute on this.

The question then is whether or not in view of the failure of several portions of the ordinance, the entire ordinance is invalid.

In the first place, there is a severance clause within their ordinance.

Such a clause creates a presumption that eliminating invalid parts a legislature would have been satisfied with what we had. That is why they, meaning the city in this instance, as Judge Gee put it, the severability clause is in there. Whether or not one was there, well it really wouldn't be controling.

The question would be as follows.

Would the statute or would the ordinance in question be functionable without the stricken language, and it would be.

And would the alteration of the ordinance so change the scope of the operation of it in a way that the counsel

never intended. In other words, would the remaining portion of this ordinance, some how or other, if enforced be contrary to the counsel's intent. Well, obviously that is not the situation.

They were perhaps interested in topless dancing as much as anything else or maybe more but they certainly set about to restrict matters which the Court finds do not fall within the First Amendment and when they put it in there about genitals and anuses I guess was to attempt to proscribe it and therefore it can't be said that it would violate their intent in enacting the legislation.

There is a strong judicial policy to avoid invalidating entire legislation schemes, where the remaining legislation after being cleansed is both operable and reflective of the legislative intent.

It cannot be said here that the city would not have enacted this ordinance had it known that this subsection would be deleted.

Therefore the Court finds that that portion which the Court has found cannot meet constitutional scrutiny can be severed from the remaining portion of the ordinance.

Accordingly the Court upholds the ordinance save for those specific portions which will be severed from it by this Court's final judgment which I will enter forthwith and accordingly the individually named defendants are hereby permanently enjoined from enforcing those provisions of the ordinance which this court notwithstanding severability findings determines to be unconstitutional under the federal law. The Court does enter an injunction against the City itself which has been joined here by agreement of the parties. That is, it enters it under 1983 based on the Monell case which permits injunctive relief against the enforcement of a city ordinance and 1331, and that is based on the

language in the Kenosha case on remand.

And the Court finds that there is a sufficient amount of money in controversy that the jurisdictional requirement of amount in controversy had been met as alleged, and it therefore under, that an amount in controversy having been pled and established to be above the jurisdictional limitation, that under the general jurisdiction of this court in federal questions, under 1331 provisions in the federal code, the injunction is in fact entered also against the city.

So, the result of all of it is that in this dance and in this particular place, as tasteless as it may be in the minds of the majority of the people, that under the federal law and in interpreting the federal constitution the Courts consistently hold that an expression such as this one is in fact entitled to First Amendment protection whether the majority thinks it is tasteless or tasteful.

Finally, the injunction of course should run against all of these named parties, their agents, and those in privity with them.

Of course there is no showing that any of the individual commissioners individually are intent upon enforcing an ordinance, that the injunction has to do with attempted enforcement under the color of law, that being part of the thrust of plaintiff's complaint, so we will officially note that this injunction should run against the individually named defendants in their official capacities. Right.

As I was thinking about this case, I really came to this understanding, that as tasteless as some people may think exposed breasts are as distinguished from arms or legs, the First Amendment is not there to cover everything save free expression regarding sex.

You ever thought of that?

In other words, sexual expression between dancers and viewers is as much protected by the First Amendment as any other kind of expression.

So, people get agitated I guess about sexual expression.

Well, the constitution does not say you can express yourself and give a message on everything else except what might have to do with sex. I guess breasts must have something to do with it because a lot of folks seem to want to go see it. I don't think its because of the baby's milk, you know what it designed for, but in any event the point is that the First Amendment covers sexual expression and interestingly, there it didn't, perhaps the most expression that is going along between any two persons in the whole United States has to do with sex.

First Amendment just about had to cover everything because I expect that there is more communication between men and women not only through speech but through conduct as has to do with sex than any other subject matter. That would be my best estimate on that subject.

So the point is that people get agitated about First Amendment rights because there is something about sex connected with it. Well, sex is simply not restricted. The First Amendment doesn't deal it out.

But really, I think that Judge Oakes put his finger on the whole proposition that in the area of the First Amendment judges have to be very careful that matters of taste do not become rules of law.

Now the injunction of course is orally entered this date at this point in open court and the city is present and recognizes it and I am sure will abide by it until

such time as it may be overturned, so that the final judgment is a matter now of form. However, any appeal from the final judgment would begin to run from the date of the entry of the final judgment in writing. So that for all practical purposes we just announce that today, until the entry of the final judgment, so that your appeal would be, if you have one, will be lined up properly, that this is a preliminary injunction, preliminarily to the entry of the final judgment in writing, and that what you will appeal if you appeal you will appeal the final judgment and that case will start to run then and you wouldn't run into problems of when it starts to run. So for all practical purposes you and your city and the named defendants are preliminarily enjoined consistent with the ruling and the permanent injunction will enter at the time of writing of the judgment.

CERTIFICATE

STATE OF FLORIDA)
COUNTY OF DADE)

I, RUTH M. FEATHERSTONE, Official Court Reporter, do hereby certify that I was authorized and did report the foregoing proceedings of which the pages numbered 1 to , inclusive, constitute a true and correct record of the proceedings before The Honorable JOE EATON, United States District Judge, at the time and place herein specified.

DATED at Miami, Dade County, Florida, this 18 day of January, 1979.

/s/ Ruth M. Featherstone